

EXHIBIT

1

1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF OHIO
3 WESTERN DIVISION

4 LAURA BECHTEL and TROY)
5 THOENEES,)

6 Plaintiffs,)

7 -vs-)

Case No. 1:19-cv-00726

8 FITNESS EQUIPMENT SERVICES,)
9 LLC dba SOLE FITNESS,)

10 Defendant.)

11 ZOOM DEPOSITION OF KEITH RAYMOND UGONE,

12 Ph.D., taken by me, Susan L. Bickert, a Court

13 Reporter and Notary Public in and for the State of

14 Ohio, at large, as upon Cross Examination, on

15 Tuesday, May 4, 2021, commencing at 9:58 o'clock

16 a.m. on behalf of the Plaintiffs.
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3 Cross Examination by Mr. Markovits

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<p>Page 5</p> <p>1 KEITH RAYMOND UGONE, Ph.D.,</p> <p>2 a witness being of lawful age, having been duly</p> <p>3 cautioned and sworn, did testify upon his oath as</p> <p>4 follows:</p> <p>5 CROSS EXAMINATION</p> <p>6 BY MR. MARKOVITS:</p> <p>7 Q State your full name, please.</p> <p>8 A Keith Raymond Ugone. Last name is</p> <p>9 spelled U-G-O-N-E.</p> <p>10 Q Doctor, you know my name is Bill</p> <p>11 Markovits, and I'm one of the attorneys for the</p> <p>12 Plaintiffs in the action in which you're being</p> <p>13 deposed.</p> <p>14 Where are you Zooming from?</p> <p>15 A Actually from my office in Dallas,</p> <p>16 Texas.</p> <p>17 Q Is anyone there with you?</p> <p>18 A No. I'm in a conference room by</p> <p>19 myself.</p> <p>20 Q Do you have any documents with you?</p> <p>21 A I have four documents in front of</p> <p>22 me. Would you like me to state what they are?</p> <p>23 Q Please.</p> <p>24 A So I have a copy -- and I think this</p> <p>25 was per your request, or at least it was</p>	<p>Page 7</p> <p>1 A I think we're okay.</p> <p>2 Q Dr. Ugone, other than that, I know</p> <p>3 you've been deposed hundreds of times, so I'm going</p> <p>4 to skip the general introduction and admonitions</p> <p>5 and get right to the substance, if that's all</p> <p>6 right.</p> <p>7 A That's fine.</p> <p>8 Q Doctor, first question. Can the</p> <p>9 attributes of a consumer product sold at retail</p> <p>10 ever have an influence on the market price paid by</p> <p>11 a consumer of that product?</p> <p>12 A Yes.</p> <p>13 Q And everything else being equal,</p> <p>14 would you agree that consumers are better off</p> <p>15 paying less money rather than more money for a</p> <p>16 product?</p> <p>17 A Holding everything else constant,</p> <p>18 yes, consumers would prefer to pay a lower price</p> <p>19 than a higher price.</p> <p>20 Q Two for two.</p> <p>21 A Yes.</p> <p>22 Q If we can keep this going. Are</p> <p>23 there methods that can be used to determine</p> <p>24 classwide damages for consumer products sold at</p> <p>25 retail?</p>
<p>Page 6</p> <p>1 communicated to me. I have a copy of Mr. Weir's</p> <p>2 report. I have a copy of Mr. Gaskin's report. I</p> <p>3 have a copy of my report, and I also just brought</p> <p>4 with me a copy of the deposition Notice.</p> <p>5 Q All righty. Thank you. And do you</p> <p>6 have a means other than talking over Zoom with</p> <p>7 contacting your attorney?</p> <p>8 A Do I have a means to do that?</p> <p>9 Q Yes.</p> <p>10 A I've got my cellphone here. I can</p> <p>11 turn it off if you would like.</p> <p>12 Q Yes. No, I'm fine with you talking</p> <p>13 with Mr. Gamache as need be, but can we agree that</p> <p>14 you will not talk to him or communicate with him</p> <p>15 while I have a question pending?</p> <p>16 A No, I will agree with that. In</p> <p>17 fact, you know, I've got my -- on computer I've got</p> <p>18 my e-mail called up. Let me just turn it off so</p> <p>19 there's no wondering about that or no dings that we</p> <p>20 hear in the background. So hold on one second.</p> <p>21 Q To the extent it's enabled, no use</p> <p>22 of the chat function.</p> <p>23 A I'm hoping I don't do something bad</p> <p>24 while I'm disconnecting things here, but --</p> <p>25 Q Always a danger.</p>	<p>Page 8</p> <p>1 A I think there are methods. It just</p> <p>2 depends on the facts and circumstances, the nature</p> <p>3 of the products. So there are methods, but they</p> <p>4 just have to be implemented properly and be</p> <p>5 appropriate for whatever the facts and</p> <p>6 circumstances of the matter are.</p> <p>7 Q Sure. What are the general methods</p> <p>8 that can be used to determine classwide damages for</p> <p>9 consumer products sold at retail?</p> <p>10 A And I'm just sort of answering very</p> <p>11 generally, but -- and to make sure I have your</p> <p>12 question, if you could just say the question again</p> <p>13 to make sure I answer it correctly.</p> <p>14 Q Yeah. Are there methods that can be</p> <p>15 used to determine classwide damages for a consumer</p> <p>16 product sold at retail?</p> <p>17 A Kind of using a common proof type</p> <p>18 approach is how I'm taking your question.</p> <p>19 Q Yes.</p> <p>20 A And I think there's sort of two</p> <p>21 different considerations at least that I think</p> <p>22 about, and one is -- has to do with, you know, the</p> <p>23 attributes of the product and are what I would call</p> <p>24 homogeneous in the sense that there's not much</p> <p>25 variability, and whether that deals with issues</p>

<p>Page 9</p> <p>1 surrounding the challenged claim or various 2 different -- the nature of the product we're 3 looking at such that it might be applicable to 4 apply, you know, a specific figure to the -- to the 5 dollars or the units that are sold. So we'll put 6 that off to the right. 'Cause that has to do with, 7 you know, when it's applicable to apply, you know, 8 a certain number or not.</p> <p>9 And then on the other side of the coin 10 you've got economic analyses where you might be 11 able to look at -- you know, do a before and after 12 analysis if product attributes have changed. You 13 might be able to do, you know, hedonic regression 14 analysis, which makes it more sophisticated in 15 terms of bringing in econometric techniques. And 16 perhaps if you're trying to figure out a change in 17 market price, you would need to take into account 18 if you were going to use a survey technique, you 19 know, something that would capture both the demand 20 side of the market and the supply side of the 21 market so you could figure out if there is indeed, 22 you know, a price associated with an attribute, or 23 in this context, you know, a price associated with 24 an attribute that's in dispute. Those are just 25 some ways that off the top of my head in response</p>	<p>Page 11</p> <p>1 talking about, you know, still things at a very 2 high level. But assuming that the data exists, 3 assuming that, you know, the conditions exist, and 4 there's always the issue of what are some general 5 methodologies. And then the other issue is do 6 those general methodologies fit in the particular 7 circumstance we're looking at? So, you know, 8 assuming all of those things, then you potentially 9 could use those techniques in the question you 10 asked, which I took to be a consumer products case 11 sold at retail.</p> <p>12 Q Right. So let's take that consumer 13 products case sold at retail with a misleading 14 claim. How would you apply a before and after 15 methodology to determine classwide damages?</p> <p>16 A Well, if -- if we're talking let's 17 say about a single product that has very little 18 price variability, and if there's no potential 19 different interpretations of the various claims 20 surrounding that product on the part of consumers, 21 there could be situations -- and I've seen 22 situations -- where a label was added. And so you 23 could do a before to a during. Or a label was 24 changed, and the offending claim or alleged 25 offending claim was taken off, so you could do a</p>
<p>Page 10</p> <p>1 to your question.</p> <p>2 Q Thank you. So to paraphrase, some 3 possible ways would be survey techniques, hedonic 4 regression and before and after?</p> <p>5 A Yeah, those are the ones that came 6 off the top of my head, but, you know, I've got to 7 add the asterisk, you know, all properly 8 implemented to make sure that they capture the full 9 extent of a change in price due to a certain 10 attribute.</p> <p>11 Q Right. Well, and that's assuming 12 the question -- because I asked the methods that 13 can be used, and we're going to assume they're 14 being used properly. Are there methods that can be 15 used -- let me ask it this way.</p> <p>16 Can those same methods -- survey 17 techniques, hedonic regression, before and after -- 18 be used to determine classwide damages for a 19 consumer product sold at retail that uses a 20 misleading claim?</p> <p>21 A I think given the facts and 22 circumstances they can, yes. To the extent, I 23 mean, it's all subject to -- A., we're talking 24 about, you know, at a very high level, and, B., 25 it's subject to data availability. So we're</p>	<p>Page 12</p> <p>1 before and after that way. Or there's many 2 different permutations, but you basically have a 3 before, during and after, if that makes sense. And 4 it depends, you know, which end point you might be 5 on to see whether there's any changes. Now, an 6 asterisk on that is you'd want to, you know, 7 control for market conditions or any other changes 8 that might have happened at the same time, but 9 there are times that there's just labeling changes 10 where, you know, those other items that I mentioned 11 that you need control for may not be as dominant as 12 in other times.</p> <p>13 Q Can you give me examples of 14 consumers' mislabeling where before and after was 15 used to determine classwide damages that you've 16 seen? You mentioned you've seen some.</p> <p>17 A Yeah. In fact, I've used that 18 myself. There's times that with, you know, 19 consumer products where there's been a labeling 20 change in terms of the content that's on, say, the 21 front label, and then you look at, you know, price 22 patterns over time. So, you know, I've actually 23 used that quite a bit, and if the data's available, 24 you know, I look to that. You know, I'm trying to 25 give you some examples, but a lot of times you can</p>

<p>1 kind of see that either on food products or 2 products that have, you know, different attributes 3 on the front label. And one of them is a 4 challenged claim, but for a variety of reasons that 5 claim might have been added or taken off for any 6 number of reasons, and then you look at price 7 patterns. So that's one way to do it.</p> <p>8 Q And you've got your report in front 9 of you, which I know has an extensive list of the 10 cases you've been involved in. Can you point to me 11 where a before and after in any of the cases you've 12 been involved in you performed or someone else 13 performed a before and after analysis to determine 14 classwide damages?</p> <p>15 A Or to evaluate -- to evaluate 16 classwide damages and whether, yeah, there was the 17 existence of a claimed price premium or not. Do 18 you want me to go through and find some --</p> <p>19 Q Yeah, just any case where classwide 20 -- well, I guess there's two categories. I know in 21 the consumer class action context you're primarily 22 on the defense side; correct?</p> <p>23 A Generally, yes.</p> <p>24 Q So you're saying sometimes you would 25 perform a before and after to evaluate a</p>	<p>Page 13</p> <p>1 Q Fair enough. I think we're about 2 the same age, so I understand.</p> <p>3 A Yeah. So on page 13, fourth from 4 the bottom, it says Diageo Beer, but that's really 5 Guinness Beer. And I may have done it in that 6 case. So on page 13, fourth from the bottom. 7 I believe on page 15, fourth from the 8 top, there's a L'Oreal reference. I believe I 9 looked at before and after in that case.</p> <p>10 On page 17, third from the bottom, All 11 Market. That was really Vita Coco. It's a coconut 12 drink. I think I looked at a before and after 13 there.</p> <p>14 Some uncertainty, but on page 22 there's 15 a Toshiba reference, fifth from the bottom. I may 16 have looked at before and after there. I mean, 17 those are just some examples.</p> <p>18 Q All right. And taking those 19 examples -- well, let me ask it this way. In any 20 of those examples, did you determine that there 21 were classwide damages relating to a mislabeling 22 claim based on a before and after analysis?</p> <p>23 A My recollection actually was that I 24 determined that individual inquiry would be 25 required.</p> <p>Page 15</p>
<p>1 plaintiff's claimed classwide damages?</p> <p>2 A No, no, no. I'm saying regardless 3 of the side I'm on, to evaluate whether there's the 4 existence of a price premium or not I would use 5 that as one of the techniques. If there was any 6 confusion over that, that's the context in which I 7 was providing the answer.</p> <p>8 Q All right. That's fine. Yeah, if 9 you can point me to any cases where you've done 10 that.</p> <p>11 A All right. Well, let me -- give me 12 a second. Just so you know what I'm doing, I have 13 a copy of my report. I'm turning to Exhibit 2 of 14 my report. And Exhibit 2 of my report has my 15 testimony experience. The first 12 pages are 16 trial, hearing and arbitration testimony. The 17 deposition testimony begins on page 13, and that's 18 where I've turned to. Just so you know if you're 19 following me. And I've got to give a -- this is 20 going to sound strange, but I'm going to give a -- 21 what I'll call a probabilistic answer. In other 22 words, to the best of my recollection, if I think I 23 did it in a case, then I'll tell you. But, you 24 know, there could be some uncertainty depending on 25 my memory.</p> <p>Page 14</p>	<p>1 Q So in those cases you determined 2 that that methodology could not be used to 3 determine classwide damages?</p> <p>4 A Actually, in those cases I went a 5 little bit farther. Not only, you know, evaluating 6 a proposal for evaluating classwide damages; but 7 also a lot of times in these cases, you know, I not 8 only evaluate proposals, but I look at the actual 9 data to see whether there's any evidence of a 10 premium. And so that's why I might be including 11 that sort of analysis. So it's going beyond just a 12 proposal stage. It's actually doing some of the 13 work as well.</p> <p>14 Q What are the problems or confounding 15 factors, if you will, in using a before and after 16 analysis to determine classwide damages in a 17 consumer class action case involving mislabeling?</p> <p>18 A The issue with a before and after 19 analysis is you have to be careful to try to 20 isolate if you do see a price change what the 21 reasons for the price change might be. So I think 22 I might have alluded to that in my prior answer. 23 But, in other words, you have to make sure you're 24 isolating -- whatever price change you observe, you 25 want to make sure you isolate it to the alleged</p> <p>Page 16</p>

<p>1 challenged claims. That might be the easiest way 2 to say it. 3 Q In any case that you've either been 4 involved in or become aware of, has in your view a 5 before and after analysis been appropriately used 6 to determine classwide damages in a consumer class 7 action case involving mislabeling? 8 A In the cases that I've been retained 9 on, the approaches that had been proposed, it was 10 my opinion that those would not be reliable given 11 the facts and circumstances and the identification 12 of all of the individual inquiry reasons why you 13 couldn't just take a common proof approach. Now, I 14 guess what I'm trying to say is in a lot of the 15 cases, I then go a little bit further to see even 16 if a price premium exists or maybe to even do some 17 comparisons to what the plaintiff's expert maybe is 18 saying. So I haven't taken the answer from the 19 before and after or of any of these other 20 approaches and then applied them in a class -- on a 21 class certification methodology using common proof 22 type approach because I was of the opinion that 23 that would be unreliable given the facts and 24 circumstances of the case. 25 Q And I understand that, but that</p>	<p>Page 17</p> <p>1 it's appropriate, but I don't then take it and use 2 it for classwide damages because the cases I've 3 worked on required individual inquiry. 4 Q Right. But that's -- again, that's 5 not my question. My question is, can you point to 6 any case? You've said that this is a methodology 7 that can be used to determine classwide damages. 8 Can you point to any case where you believe that 9 was appropriately done, whether you were involved 10 or not? 11 A Yeah, and I've said when it's 12 appropriately implemented. So I always did have 13 that asterisk. I don't know that I can give you -- 14 I mean, I've used it to just evaluate whether there 15 were price premiums or not, but I don't know that I 16 could say whether I've seen it to do classwide 17 damages. 18 Q And let's now turn to hedonic 19 regression, which you indicated was another 20 methodology that could be employed to determine 21 classwide damages in consumer class action cases. 22 Let me just cut to the chase on that one. 23 Can you point to any case that you've 24 been involved in or are aware of where in your view 25 a hedonic regression methodology was appropriately</p> <p>Page 19</p>
<p>1 wasn't my question, Doctor. My question was, you 2 indicated that a before and after methodology could 3 be used potentially to determine classwide damages 4 in consumer class action involving mislabeling. My 5 question is, have you ever seen it done 6 appropriately in your view? 7 A I've seen -- I think I've seen 8 before and after, but there's also more 9 sophisticated ways because the -- when I said 10 hedonic regression -- 11 Q Before we get to that, let's just 12 stick with before and after. Have you ever seen an 13 appropriately done before and after methodology 14 used to determine classwide damages? 15 A And I'm sorry. You did cut me off. 16 I was going to tie the two together; that hedonic 17 regression is a more sophisticated way of almost 18 doing a before and after that helps control for the 19 confounding factors. So you didn't quite let me 20 say that, but I'll just put that off as a 21 parenthetical. 22 Q All right. 23 A I've always -- I felt that, you 24 know, it's -- it gives insights. And there's times 25 that you have isolated changes in labeling where</p> <p>Page 18</p>	<p>1 implemented to determine classwide damages? 2 A Not that it was appropriately 3 implemented. I've seen it implemented, and I've 4 seen plaintiff experts use it, but I've always felt 5 that there were deficiencies in the implementation 6 of the hedonic. That's not saying that it couldn't 7 be done. I'm just saying when I've usually seen 8 it, I had issues with the way it was implemented. 9 Q And then the third methodology you 10 discussed was a survey technique that could be used 11 to determine classwide damages in consumer class 12 action. Have you ever seen a survey technique 13 appropriately implemented to determine classwide 14 damages in a consumer class action? 15 A Not where I haven't had issues with 16 a problem. Now, there -- or with the 17 implementation. There's different -- I'm a little 18 hesitant when we just kind of say, you know, just 19 survey techniques by itself because there's 20 different survey techniques, and not all of them, 21 you know, take into account what's required. But I 22 have seen -- some plaintiff experts, for example, 23 determining classwide damages have taken the survey 24 techniques farther than other experts in terms of 25 attempting to evaluate classwide damages.</p> <p>Page 20</p>

<p>1 Q Correct. But as I understand it, 2 you've never seen one take it far enough in your 3 view to provide an appropriate determination of 4 classwide damages?</p> <p>5 A On the cases that I have worked on, 6 there was usually an issue with the implementation. 7 That's correct.</p> <p>8 Q On any case, whether you worked on 9 it or not, are you aware of any case where a survey 10 technique -- any type of survey technique was 11 appropriately implemented to determine classwide 12 damages?</p> <p>13 A Yeah, I can't speak to the cases 14 that -- you know, that I haven't worked on. I 15 can't speak to that. But I know the courts have 16 accepted, you know, various techniques. The courts 17 have at times accepted survey techniques, accepted 18 hedonic regression, which I said is a more 19 sophisticated way of thinking about a before and 20 after in many respects. And also benchmark 21 products. I probably should have included that in 22 my answer as well, looking at benchmark products. 23 And I've seen combinations of the two. So I've 24 seen all of those.</p> <p>25 Q And in any decision that you've</p>	<p>Page 21</p> <p>1 put that into two categories. One is just sort of 2 a proposal, "This is what we could do," but it's 3 quite often on consumer class action cases where 4 the plaintiff's expert will actually conduct the 5 survey or actually do the regression. So I wasn't 6 -- I wasn't sure if you were talking about both of 7 those?</p> <p>8 Q Both of those.</p> <p>9 A Okay. And if you don't mind, if I 10 could just have the question again.</p> <p>11 Q Sure. Can you give me a rough 12 estimate, because I know you've been involved in 13 a lot of cases. Can you give me a rough estimate 14 of how many consumer class actions you've been 15 involved in where a plaintiff's expert has 16 attempted to use or proposed to use any of the 17 methodologies you've discussed to determine 18 classwide damages?</p> <p>19 A I would say, frankly, in -- I want 20 to say in all of them there's either been a 21 proposal or the actual work involving either a 22 survey technique or a regression technique or some 23 sort of pricing comparison, whether it's before and 24 after or whether it's to a benchmark product. Just 25 expanding my prior answer a little bit to include</p>
<p>Page 22</p> <p>1 reviewed or any case that you've been involved in, 2 based upon your review or your involvement, did you 3 ever come to the conclusion, yes, the plaintiff's 4 attorneys got it right or the plaintiff's experts 5 got it right and there are classwide damages in 6 this consumer class action?</p> <p>7 A If I understand your question, on 8 the cases I've been retained on, I've always felt 9 that there was individual inquiry issues that 10 prevented the evaluation -- reliable evaluation of 11 classwide damages using common proof. Those are 12 the cases that I've been involved in. But I know, 13 you know, cases are -- you know, get approved by 14 the courts and methodologies get approved by the 15 courts and, you know, there's just, you know, 16 variability in that depending on the facts and 17 circumstances of the case.</p> <p>18 Q How many consumer class action cases 19 have you been involved in where plaintiff's 20 attorneys or plaintiff's experts attempted to use 21 one of the methodologies that you are discussing?</p> <p>22 A If I could ask for one 23 clarification.</p> <p>24 Q Okay.</p> <p>25 A When you say "attempted to use," I</p>	<p>Page 24</p> <p>1 potential benchmark products. But I think -- I 2 think, you know, except for the -- you know, I'm 3 trying to think if there's an exception to that, 4 but I think it usually falls into those three 5 buckets or so, three-plus buckets.</p> <p>6 Q And approximately how many cases 7 would that be that you've been involved in that?</p> <p>8 A I think I've been involved over the 9 course of my career, you know, maybe going back ten 10 years maybe 40 or 50 different cases.</p> <p>11 Q And as I understand it, in those 40 12 or 50 consumer class action cases you've been 13 involved in where one of those either potential or 14 actual methodologies were either potentially used 15 or actually used, in all of them you had some issue 16 with respect to their use to determine classwide 17 damages?</p> <p>18 A Yes. Either it didn't fit the facts 19 and circumstances, so it's a problem with the data, 20 there was different interpretations of variables, 21 there were reasons for individual inquiry. But, 22 yes, those are -- generally I get involved in cases 23 where those are issues.</p> <p>24 Q And you mentioned some of the 25 confounding factors or problems with regard to a</p>

<p>1 before and after. What are some of the confounding 2 factors or problems with regard to hedonic 3 regression? 4 A Yeah, it's, you know, regression -- 5 and tell me if I'm expanding the answer too much. 6 I don't want to, you know, just take up your time. 7 But with a regression analysis, you know, it's a 8 statistical analysis applied to economic data. And 9 so sometimes there could be problems with the 10 underlying data. In other words, it's not uncommon 11 that it's not only a before and after, but you 12 might be doing a before and after on other products 13 as well. Or you might be looking at the price of 14 the product in question that has a certain 15 attribute relative to either itself or the prices 16 of other products. And sometimes you may not know 17 if there were labeling changes on the benchmark 18 products, just as one example. Or there can be 19 confounding labeling changes in the product in 20 question or just changes in, you know, the 21 attributes of the product. You know, there can be 22 changes in, you know, market or macroeconomic 23 conditions that the equation may or may not pick 24 up. I mean, the whole idea -- and just bear with 25 me for one or two more sentences, and then I'll</p>	<p>Page 25</p>	<p>1 associated with a particular attribute if that 2 attribute was no longer present in a product. And 3 there could be issues with different 4 interpretations of what one is looking at, what the 5 disputed claim is. There could be issues of 6 identifying what the real drivers of demand are for 7 the particular product and whether those are 8 included or not. The biggest thing is is that 9 conjoint analysis, if not appropriately adjusted, 10 just measures the demand side of a product let's 11 just say. But we all know that prices are 12 determined by the interaction of supply and demand. 13 So rather than measuring a change in price -- a 14 change in value is measured by price, which is how 15 economists measure value. If the change is in 16 price, it might just really be picking up a change 17 in, you know, willingness to buy type measures, 18 which in isolation would not be the same as a 19 change in price because it's missing the supply 20 side of the market. So at a very high level that's 21 the answer to the question. There's probably more 22 'cause a lot of it has to do with, you know, 23 getting all the right determinants of demand for 24 the product as well. 25 Q I appreciate the high level. So for</p>	<p>Page 27</p>
<p>1 stop. But the whole idea of a regression -- which 2 is kind of one step removed from just the straight 3 before and after -- the whole idea of the 4 regression is you want to try to control for all 5 the other potentially confounding factors or 6 events. And so your regression tries to explain 7 let's just say prices as determined by a number of 8 different considerations. And those other 9 considerations are, hopefully, controlling for 10 changes in price that are caused by or associated 11 from something different than the challenged claim, 12 if that makes sense. 13 Q Okay. And with regard to survey 14 techniques, what are the major problems or 15 confounding factors in their use to determine 16 classwide damages? 17 A Yeah, so, you know, with survey 18 techniques, you know, you usually see something 19 like -- generally speaking, you'll see something 20 like a conjoint analysis done. And I want to make 21 sure that it's clear that I'm not saying that 22 conjoint analysis isn't generally accepted or 23 doesn't have its time and place. So that's not, 24 you know, what the issue is. The issue is whether 25 it can appropriately isolate a price premium</p>	<p>Page 26</p>	<p>1 a high level on the benchmark -- first of all, 2 describe how would a benchmark analysis be used to 3 determine classwide damages in a consumer class 4 action? 5 A Yeah, or it would be something to 6 look at to give you guidance as to the existence of 7 a price premium. But a benchmarking is really kind 8 of comparing two different -- you know, two 9 different products that are otherwise either 10 identical or very similar and to see what some of 11 the prices are, and can you interpret that 12 difference in price, if there is one, to a 13 difference in an attribute between the two 14 products. So it's very similar to a before and 15 after, except it's across products as opposed to 16 across time of the same product. 17 Q All right. And what are the high 18 level problems or confounding factors with regard 19 to use of a benchmark analysis? 20 A The otherwise comparability of the 21 products. So if you're going to use one product as 22 a benchmark for the other, you want to try to get a 23 product that's as close as possible or set of 24 products that would be close as possible to give 25 you guidance. And the issue would be are there</p>	<p>Page 28</p>

<p>1 other differences between the products so that it's 2 not, you know, as good a benchmark as you could 3 get. 4 Q Moving on. Are you familiar with 5 the Federal Judicial Center's Reference Manual on 6 Scientific Evidence? 7 A Yes. 8 Q Have you read through it? 9 A Yes. And, in fact, one of the very 10 earliest versions, if we go back to the eighties or 11 late eighties, I actually helped somebody edit one 12 of the chapters in that. The chapter on damages. 13 I didn't get any credit 'cause I was just a -- you 14 know, a -- you know, first- or second-year analyst 15 at the time. But there was someone who was a 16 reviewer of one of the chapters, and I actually did 17 the work in the background. 18 Q Isn't that always the way. 19 Are you familiar with the current section 20 on calculating economic damages? 21 A I think so. I've seen -- I mean, 22 from time to time I look at it. I mean, I haven't 23 read it in its entirety, but from time to time I 24 look at it. Sure. 25 Q And do you consider that generally</p>	<p>Page 29</p> <p>1 it's a 3.0 or a 3.5 or even a 4.0 horsepower 2 engine. I haven't isolated the change in price 3 just due to a different horsepower engine. I've 4 looked at the prices of the products, and I 5 recognize there's eight different challenged 6 products, and I think there's either two or three 7 different horsepower capabilities, but I haven't 8 analyzed how much of the price is due to a 9 particular horsepower capability, if that's what 10 you're asking. 11 Q Do you intend to do that? 12 A I have not thought about sort of 13 what goes beyond, you know, where we are now. I 14 understand we're at the class certification stage. 15 You know, sometimes -- and I guess I just say I 16 need to be a little bit careful because sometimes 17 in cases there's class certification stage. Then 18 there's the merits. Sometimes judges kind of 19 combine both together, and it gets very confusing 20 to me. So I try to stay out of that. I issued the 21 report that I've issued, and at this point I 22 haven't been asked, nor have I contemplated, doing 23 anything else. I'm comfortable with the report I 24 have for the purpose to which it was intended, if 25 that makes sense.</p> <p>Page 31</p>
<p>1 authoritative on the subject? 2 A Yeah. I wouldn't disagree with the 3 principles. It always comes down to, you know, do 4 the methodologies fit the facts and circumstances 5 of the case. In other words, there's generally 6 accepted methodologies, and there's a fork in the 7 road there that sometimes, you know, you may have 8 to look at things a little differently. But 9 there's generally accepted methodologies, and then 10 there's the implementation of the generally 11 accepted methodologies. So if we were to just say, 12 "Hey, you know, where does somebody hit a curve in 13 the road and go off the road," it could happen in 14 one of those two places. 15 Q Have you done any research to 16 determine whether Sole's horsepower claims 17 influenced the price of their treadmills? 18 A Have I done any research to -- are 19 you talking about the -- I guess the -- what they 20 tell consumers the horsepower is of the engine on 21 the treadmill? Is that what you're asking? 22 Q Yes. 23 A I have not -- if I understand your 24 question, for example, some of their models I think 25 have a -- I think, if I remember correctly, whether</p> <p>Page 30</p>	<p>1 Q Sure. If you wanted to determine 2 whether Sole's horsepower claims influenced the 3 retail price of their treadmills, how would you go 4 about doing that? 5 A Well, I think -- I think one would 6 have to -- now, I haven't done that, so I'm just 7 giving you an answer off the top of my head. 8 Q Sure. 9 A But I try to look at the demand 10 side, and I try to look at the -- you know, the 11 supply side. I'd also probably look at what, you 12 know, competing models are out there because that 13 puts a constraint on, you know, a company's, you 14 know, ability to charge. I mean, it's a 15 competitive environment. So you've got to take 16 into account demand -- sort of general demand 17 factors in the market, demand for your product in 18 question, if your product's differentiated, the 19 supply side, cost of production. You might take 20 into account, like I said, competing products and 21 the prices of competing products and the attributes 22 and so forth. So I think that would be a beginning 23 point that I would try to collect, and this is just 24 all off the top of my head and subject to data 25 availability. But if I were to say -- or just</p> <p>Page 32</p>

<p>1 respond like to the question you asked me, you 2 know, at a very high level, those would be my 3 initial thoughts of the things that I would look 4 at.</p> <p>5 Q Let me go back to an earlier line 6 for a minute. Have you ever testified or provided 7 a report indicating in a case that classwide 8 damages could be calculated?</p> <p>9 A Yes. So that's what I was trying to 10 say before. The cases that I've worked on I've 11 determined that classwide damages could not be 12 reliably appropriated -- or reliably calculated 13 using a common proof approach. So --</p> <p>14 Q And I'm trying to expand it a little 15 because we were talking before about consumer class 16 actions. And I know you've been involved in 17 securities cases and antitrust cases and other 18 cases. Have you ever testified that classwide 19 damages could be calculated regardless of the type 20 of case?</p> <p>21 A Yes.</p> <p>22 Q In what case, if you can recall, or 23 cases have you testified that classwide damages 24 could be calculated?</p> <p>25 A And in the interest of making sure</p>	<p>Page 33</p> <p>1 product. I'm not sure if I can give you an exact 2 example, but there have been times, I believe -- or 3 let me take a step back. Here's why I'm 4 hesitating. Some antitrust cases might just be one 5 company against another company. Some antitrust 6 cases may be a group of companies involved. So I 7 probably need to be careful on that. But I don't 8 think -- I think the converse answer is easier. I 9 don't think I've ever given an opinion that you 10 would need the individual inquiry and, hence, 11 didn't come up with a number. Although there's 12 times that negotiating dynamics might be very 13 important in the consideration. So I want to be a 14 little careful with my answer. So I think I'm 15 always sensitive to that, but I don't think the 16 issues have arisen as much for me in the antitrust 17 context as in the consumer class action. Maybe 18 that's the best answer.</p> <p>19 Q Going back, earlier I asked you 20 whether you had done any research to determine 21 whether the horsepower claims -- Sole's horsepower 22 claims had any influence on the retail price of 23 their treadmills. Related, but slightly different 24 question. Do you have any opinion as to whether 25 the horsepower claims of Sole have any influence on</p>
<p>Page 34</p> <p>1 that we're not misinterpreting my answer here, but 2 when I've worked on securities cases and one is 3 determining an inflation component in a stock 4 price, I usually -- or, frankly, always have come 5 up with a particular inflation component at least 6 for a portion of the class period. That inflation 7 component could change over the length of a class 8 period. So we might have different inflation 9 components across time, but at any moment in time 10 that inflation component could be applied to all 11 the shares that are being transacted at least at 12 that moment, if that all makes sense. But what I 13 wanted to make clear that those were all in the -- 14 you know, in the classwide damages phase of the 15 case.</p> <p>16 Q And are those in securities cases?</p> <p>17 A Yes.</p> <p>18 Q Any antitrust cases where you've 19 determined classwide damages were appropriate?</p> <p>20 A I want to be careful in how I phrase 21 it. The answer is -- to the spirit of the 22 question, the answer is going to be, yes, I think 23 -- but I think -- I just need a little time to 24 think about some of the cases. But my feeling is 25 that that would be yes. Now, it may vary by</p>	<p>Page 35</p> <p>1 the retail price of their treadmills?</p> <p>2 A Yeah, the -- I guess where I was 3 thinking through your question, when you say "the 4 horsepower claims," there's a couple of different 5 ways, frankly, that that could be interpreted. And 6 so like if some treadmills have a 3.0 horsepower 7 motor and some have a 3.5 horsepower motor. Now, 8 you've been using the Sole claims phraseology, and 9 I've been thinking in terms of some of the motors 10 are just different. Some have a rated horsepower 11 that are greater than ones that have a lesser 12 horsepower rating. And my understanding is that a 13 3.5 horsepower motor is more expensive than a 3.0 14 horsepower motor. So that's likely -- likely -- 15 although I haven't done this empirical analysis, 16 but it's likely that that will have an impact on 17 price, that you've got a -- you know, a higher 18 rated motor in one of the treadmills versus 19 another. So intuition in economics is telling me 20 that, but I haven't done that study. But I've also 21 tried to communicate to you how I'm answering the 22 question.</p> <p>23 Q And as I understood your answer, 24 your general economic intuition would be that the 25 higher the horsepower, the higher the price?</p> <p>Page 36</p>

<p>Page 37</p> <p>1 A The intuition is that the higher the 2 horsepower probably means it's a higher cost input 3 into the treadmill, and it's likely that that will 4 also manifest itself in a higher price for the 5 treadmill.</p> <p>6 Q And based on your review of this 7 case and the facts in this case to date, is it 8 likely that as Sole's claimed horsepower for its 9 treadmills increased, the treadmill prices 10 increased as a result?</p> <p>11 A I didn't -- I apologize. I didn't 12 quite get the question. I just need it again.</p> <p>13 Q Based on your review of the facts in 14 this case to date, is it likely that as Sole's 15 claimed horsepower increased for its treadmills 16 that the treadmill price increased as a result?</p> <p>17 A I think there were -- from what I 18 understand that there's many different dynamics 19 that go into the pricing of the treadmills, 20 including the various attributes, but also what the 21 competitive environment is. And, you know, you've 22 got the Sole treadmills, but you've got 23 NordicTrack, you got the Nautilus or the Bowflex 24 and so forth, ProForm. That those all create a 25 competitive environment that has an impact on</p>	<p>Page 39</p> <p>1 Q Sure.</p> <p>2 A When you're talking about Sole's 3 horsepower claims, or whatever phraseology you're 4 using, I'm never quite sure if you're just talking 5 about factually what the rating on the engine is or 6 whether you're saying what I think I saw in the 7 complaint or others have referred to as kind of an 8 inflated horsepower claim. So I'm not quite sure, 9 you know, what you're referring to.</p> <p>10 Q I'm not getting at whether it's 11 inflated or not inflated at this point. I'm just 12 saying, for example, if the F80 has a label on it 13 that says 3.5 either CHP or HP, whether you think 14 that fact that it's being marketed as a 3.5 15 horsepower motor carries with it some price premium 16 over if it was labeled as a 3.0 horsepower let's 17 say?</p> <p>18 A Yeah. I mean, all I can say is my 19 intuition tells me that that motor would cost more. 20 But given the -- you know, the variability and the 21 attributes of the different treadmills, I can't 22 say, you know, whether there's a premium or what it 23 is or whether it just all gets lost in the mix by 24 the time you put together, you know, the hundreds 25 of different attributes of the product.</p>
<p>Page 38</p> <p>1 prices. And I think Sole, you know, my 2 understanding is takes those into account. I don't 3 know if I've seen a situation where for any 4 particular treadmill they've gone from like a 3.0 5 to a 3.5, or at least I don't remember. I think my 6 memory is for each of the individual treadmill 7 models that I think -- but I'm not sure -- that 8 those horsepower motors have stayed the same. So I 9 don't think I've seen what you're asking me about, 10 or at least I don't recall.</p> <p>11 Q So in that respect, from what you've 12 seen can you say one way or another or do you have 13 an opinion one way or another whether there's been 14 any price premium attributable to Sole's horsepower 15 claims on its treadmill?</p> <p>16 A I don't think I've seen any evidence 17 of a price premium. Now, when you say the 18 "claims," again, I want to make sure we're speaking 19 the same language in a sense. 'Cause a claim could 20 be that it's a 3.5 horsepower engine -- or motor I 21 should say. A 3.5 horsepower motor or a 3.0 22 horsepower motor versus the allegations that I 23 understand the named plaintiffs are putting forth. 24 So when you say -- I think I just want to have a 25 common language with you.</p>	<p>Page 40</p> <p>1 Q So if I understand you, so that we 2 are on the same page, you're not saying there isn't 3 a price premium, but you can't say at this point 4 that there is?</p> <p>5 A Well, actually, if we go back to my 6 report, what I'm saying is that you can evaluate 7 classwide damages using a common proof approach 8 because of all the things that are in my report. 9 That's what my opinion is. I haven't really gotten 10 into the merits. That if the court were to certify 11 the class and if someone put forth a number as to 12 what that premium was, then I would take the next 13 step if so retained to evaluate that and to see 14 whether it makes economic sense. But I haven't 15 done that part of the analysis.</p> <p>16 Q But going back to what you said 17 earlier, I think you said your economic intuition 18 would be that as you increased horsepower, the 19 price increases as well?</p> <p>20 A Actually, I kind of gave some 21 linkages that as you increase the horsepower motor 22 rating, it's likely that that's a higher cost of 23 the input. And probability -- or 24 probabilistically, yes, that would have an impact 25 on the price. But there's other dynamics like a</p>

<p>Page 41</p> <p>1 competitive environment, profit margins. So 2 there's all kinds of things that could impact that. 3 But if you just kind of took that in isolation, it 4 could have that sort of effect. When an input 5 price increases, there could be upward pressure on 6 the price, but there's other dynamics you have to 7 take into account as well.</p> <p>8 Q Do you know whether any consumers 9 are willing to pay more for treadmills that claim 10 to have a higher horsepower?</p> <p>11 A I have not done a study of whether a 12 consumer is willing to pay more for a 3.5 versus a 13 3.0 horsepower engine. Part of it is is that, you 14 know, we do see some treadmills with a 3.5 15 horsepower motor, and we do see treadmills with a 16 3.0 horsepower motor, but there is often a lot of 17 other differences between those treadmills as well. 18 So you can't just take, you know, the price 19 difference.</p> <p>20 Q But you're not ruling out the 21 possibility that, all other things being equal, a 22 consumer might be willing to pay more for a 3.5 23 horsepower than for a 3.0 horsepower treadmill 24 motor?</p> <p>25 A Yeah, I'm not saying -- I haven't</p>	<p>Page 43</p> <p>1 people would want to spend on a treadmill. You 2 have different people that may want to have high 3 tech treadmills versus ones -- you know, like my 4 treadmill is out in the garage, and I've got a TV 5 there, and I don't care if I've got Bluetooth or 6 not 'cause I turn on my TV. So, you know, I put 7 less of a premium on that. I'm just giving you an 8 example, just a survey of one on that. And then 9 also, you know, there's durability aspects. Some 10 people will be using it every day; some people 11 maybe just be sporadically. The only point I'm 12 trying to make is that it often is the case where 13 firms will have many differentiated products to try 14 to increase their sales and hit different market 15 segments. So this is the very long-winded way of 16 saying when you ask the question, "Why do they have 17 a 3.0 and a 3.5," it just may be that the 18 combination of all of the attributes when you use 19 the 3.0 appeals to some consumers, and a 20 combination of all the attributes when you use the 21 3.5 horsepower or the 4.0 horsepower, you know, 22 appeal to a different set of consumers. And so 23 they're trying to make sure that they increase the 24 probability that they can expand, you know, the 25 potential market they're selling into.</p>
<p>Page 42</p> <p>1 done that analysis. I haven't said that one way or 2 another.</p> <p>3 Q Okay. Do you have any opinion as to 4 why Sole sells treadmills with different horsepower 5 claims?</p> <p>6 A Well, I want to be careful here. I 7 don't think I've asked them that direct question. 8 Just as an economist and with my background and 9 looking at the treadmill models, I can give an 10 answer, but I don't know if it's the company 11 answer. So I would caution it that way.</p> <p>12 Q All right. And with that caution, 13 what's your answer?</p> <p>14 A Just that there -- you know, 15 companies -- frankly, every company -- objective of 16 firms are to maximize profits, and sometimes that 17 means that you want to hit different, you know, 18 market segments. You want to hit different 19 segments of consumers. Different consumers have 20 different tastes and preferences. You know, just 21 to bring it on home here, you know, you've got 22 athletes, you've got, you know, sprinters, joggers 23 and let's say walkers in terms of how people get 24 their exercise. You have different, you know, 25 socioeconomic backgrounds and incomes and how much</p>	<p>Page 44</p> <p>1 Q Let's shift our common understanding 2 of terminology for a second, and now I'm going to 3 talk about challenged claims. Which let's define 4 if we can challenged claims as the claims of Sole 5 that let's say the F80 has 3.5 continuous 6 horsepower, or horsepower, when, in fact, according 7 to plaintiffs, it's much less. All right?</p> <p>8 A So when you talk about the 9 "challenged claims," that's what you're referring 10 to?</p> <p>11 Q Yes. For each of the treadmills the 12 challenged claims as to horsepower, if you were 13 tasked with determining whether a price premium 14 exists for each of those challenged claims, how 15 would you go about doing it?</p> <p>16 A I mean, the problem is I keep going 17 back to the individual inquiry issue and that -- 18 it's almost like you're asking me how would I do a 19 classwide damages approach using sort of a common 20 proof approach? And just given my understanding of 21 the consumers, the demand drivers, you know, I'd 22 still have the issue that it needs individual 23 inquiry as opposed to just a common proof approach. 24 So that would --</p> <p>25 Q Okay. I'm sorry to cut you off. So</p>

<p>1 are you saying that because it needs -- and I 2 understand your position is that it needs 3 individual inquiry. So would the price premium 4 then in your view potentially differ for each 5 consumer with regards to the challenged claims? 6 A I mean, theoretically, if we were 7 just talking theoretically, which is how I'm 8 interpreting your question, you could have -- if 9 there were a price premium, it could be different 10 across consumers, or it may not exist at all. You 11 know, I talk a little bit in my report about, you 12 know, treadmills being an experience good where 13 people may go to the sporting goods store and 14 actually try out the treadmill. You know, it's an 15 expensive item. It's a -- you know, it's -- you 16 know, you're not buying a loaf of bread. You're 17 buying a treadmill that could range from, you know, 18 a thousand dollars to two or three thousand 19 dollars. So it's not uncommon for people to try 20 those out, in which case they could be perfectly 21 happy with their purchase and it not have an impact 22 at all. 23 Q Okay. We'll talk about that a 24 little bit more, but since you've raised it, let's 25 touch on it for a second.</p>	Page 45	<p>1 I'm sure they're relying on either word of mouth, 2 friends, they've seen it in action, or there's, you 3 know, reviews on the attributes of the treadmill 4 and, you know, the performance and so forth 5 relative to price. And even if we're at 50-50 with 6 you and I, that still says, hey, we need individual 7 inquiry because you didn't and I did. 8 Q Well, let me go back to my question, 9 which was, do you have any knowledge of what 10 percentage of consumers generally test a treadmill 11 before purchase? 12 A No. I can't -- I can't speak to 13 that. But that's part of the point. We know that 14 you can't say it's zero. We know that people do do 15 it because not only the behavior of consumers, but 16 also the behavior of suppliers. The mere fact 17 there's a huge opportunity cost when you line up 18 all these treadmills on your floor. That means 19 you're not selling other products. So there's a 20 huge opportunity cost to the sellers, and so they 21 must think it's valuable to the consumer to have 22 them out there to be tested. 23 Q With regard to that, in this 24 particular case how would testing it have an impact 25 on -- let's talk about the challenged claim now.</p>
<p>1 You mentioned that it's an experience 2 good and that it's not uncommon for people to try 3 it out. Do you base that on any research, or is it 4 just intuition? 5 A Well, actually more than that. I 6 mean, I'm, you know, an economist by training. I 7 have my skills, knowledge, education, experience 8 and training. Experience goods are a well accepted 9 economic concept about some goods. And I've 10 observed in the marketplace that sporting goods 11 stores will actually have treadmills out on the 12 floor taking up a lot of space, and I've observed 13 consumers actually trying, you know, the treadmill. 14 You know, I don't want to overplay this, but as a 15 survey of one with myself, I tried out the 16 treadmill before I bought it. I didn't want to 17 just buy it off the catalog. So I think it's -- 18 Q A survey of two, I did not. 19 A Okay. 20 Q So now we're 50-50. Do you have any 21 idea what percentage of consumers who buy 22 treadmills test them before purchase? 23 A They either test them or maybe they 24 look at reviews. I mean, it's usually not a sight 25 unseen type product. So if they don't test them,</p>	Page 46	<p>1 How would testing it either validate the challenged 2 claims or invalidate the challenged claim? 3 A I don't think it -- if I understand 4 your question, and I'm taking your words literally, 5 testing doesn't -- if I understand the words you're 6 using -- validate or invalidate claims, but it says 7 something about the consumers' testing of the 8 performance of the -- of the item, of the 9 treadmill, and whether the performance-to-price 10 ratio is acceptable to the consumer. In other 11 words, were they -- did they get what they bought 12 and at the price that they paid? So, in other 13 words, they test it. They, you know, tested the 14 different speeds and other attributes to see if the 15 performance-price ratio was something that they 16 felt that they would want to buy that product. 17 Q Testing wouldn't determine -- would 18 testing in your view allow a consumer to determine 19 whether or not an F80 was 3 horsepower, 3.25 20 horsepower, 3.5 horsepower? 21 A The -- here's where I want to be 22 careful in our terminology again. There's the 2.5, 23 3.0, 3.5 and 4.0 horsepower engines -- or motors. 24 I keep saying engines because I'm thinking of cars. 25 But motors for the treadmills. And I think my</p>

<p>Page 49</p> <p>1 understanding is of the -- of the challenged claims 2 by the plaintiff is that you really don't get 3 either that horsepower, or for a variety of reasons 4 -- I'm not the technical person, so this is all in 5 layman's language. 6 Q Yeah. 7 A But there's technical reasons 8 plaintiffs would claim that it's not at that rated 9 or stated level, the effective horsepower. And 10 what I'm saying is that a consumer may not know the 11 technicalities of it. In other words, when you buy 12 a car, you know, you don't know what's in the 13 electronic control unit. You don't know what's, 14 you know, in the engine. I mean, I've got a Honda 15 hybrid Civic, and I don't have a clue how the 16 battery works; but I like the performance of it, 17 and I was willing to pay the price for that car 18 given that it was a hybrid and, you know, the 19 benefits that I got from having a hybrid. Well, 20 it's the same thing with the treadmills. I don't 21 think any individual consumer, unless they were 22 somehow, you know, a very sophisticated engineer 23 perhaps and did some testing on the floor there of 24 the store -- I think what consumers would look at 25 is does the performance of the product meet with</p>	<p>Page 51</p> <p>1 maximize revenue. 2 Q Okay. If Sole had an existing 3 inventory of a hundred thousand treadmills, and the 4 prevailing market price was below Sole's cost to 5 manufacture the treadmills, would Sole have a 6 higher profit if it sold the units below its cost 7 or if it refused to sell the treadmills at any 8 price? 9 A The -- I may need -- let me give an 10 answer, and then we'll see if this answers it or if 11 I need a clarification of the question. But 12 sometimes when an economist says something, there's 13 fuller implications or additional implications. 14 The objective of the firm is to maximize 15 profits or minimize losses. And so, yeah, 16 maximizing revenue may or may not be the profit 17 maximizing level of output. In other words, you 18 could -- there could be a profit maximizing 19 solution that gives you greater profits at a lower 20 level of revenue, and that can happen. So that's 21 why we say maximize profits. But I guess what I 22 was trying to say is -- in response to what you 23 said is the firm will maximize profits or minimize 24 losses. That's the objective of the firm. So 25 they'll follow that behavior that will achieve</p>
<p>Page 50</p> <p>1 the price that they're paying? And that's what I'm 2 talking about with the fact that it's an experience 3 good. They tried it. They're rated. The label on 4 the motor would say 3.5. They got on it. They 5 tried it. It fit their needs, and they paid a 6 price that they thought was the appropriate price 7 to buy that product. 8 Q Let me go back to something you said 9 a few minutes ago. 10 A Actually, if you're going to switch, 11 if you don't mind about every hour I'd like a 12 break. 13 Q Every hour. That's fine. I was 14 going to suggest a break shortly, but now is good. 15 A All right. Thank you. 16 Q Be back in about five minutes? 17 A That will work. 18 Q All right. Thank you. 19 (Whereupon, a recess was taken.) 20 Q Dr. Ugone, you touched on this 21 earlier, but you would agree that Sole generally 22 seeks to maximize revenue? 23 A Actually, maximize profits. 24 Q What about revenue? 25 A No, it wouldn't make sense to</p>	<p>Page 52</p> <p>1 these objectives. 2 Q Okay. And just in the abstract, 3 with those hypotheticals -- and assuming they can't 4 wait it out in the market, they've got a hundred 5 thousand treadmills, prevailing market price is 6 below cost -- would they maximize profits by 7 selling below cost or refusing to sell at any 8 price? 9 A So if they -- I want to make sure I 10 have the hypothetical. So if they have a series of 11 treadmills where the cost of production is greater 12 than the existing market price, what do they do? I 13 think that's what you're asking me. 14 Q Sounds fair. 15 A Okay. I would say it might depend 16 on, A., expectations, but also the holding cost. 17 In other words, if this is something that's 18 perpetual, that there's not going to be any change 19 in market conditions, then, you know, they probably 20 sell those units at a loss. But if the holding 21 costs were not that great, and if you expected the 22 market to rebound, then you would analyze those 23 factors, put them into the calculus, put them, you 24 know, into the adding machine and decide, you know, 25 whether you hold or sell.</p>

<p>1 Q From your work on this case to date, 2 do you have any idea who sets the retail price for 3 Sole's treadmills?</p> <p>4 A You know, people talk about setting 5 price, but I take it as market-determined prices. 6 In other words, it's influenced by competitor 7 prices. It's influenced by certain seasonality 8 factors. You'll see some variability in prices. 9 So it's adjustments across time. It's set by, you 10 know, what -- an interaction of the demand side, 11 but also, you know, kind of a rate of return or 12 profit margin that the company needs to stay in 13 business. All of that goes into a market- 14 determining price.</p> <p>15 Q And more narrowly -- looking at it 16 more narrowly, do you have an understanding of who 17 actually sets Sole's retail prices, not in terms of 18 market determinants or how it's set, but who sets 19 it?</p> <p>20 A Yeah, I guess that's where I can't 21 separate it out. I mean, I think companies figure 22 out a price, and there's a price -- I'm trying to 23 figure out the best phraseology to use. There's 24 sort of the -- you know, there's a price that they 25 have, but then there's sort of the everyday price</p>	Page 53	<p>1 A Again, you can say "sets it," yes. 2 Somebody has to type in the price. But I know they 3 look to the competitive environment to make sure 4 that their product is situated, you know, where 5 they think it should be relative to competitor 6 products, but also in a sense competing against 7 itself. In other words, what is Dick's charging 8 for the product? And so I think Sole has a 9 philosophy they need to be at least in line with 10 what Dick's may be selling the product for.</p> <p>11 Q They don't set the price that Dick's 12 sells it, Dick's Sporting Goods?</p> <p>13 A I think Dick's has the ability to 14 vary that price, and I think they do vary the 15 price. That doesn't mean the preponderance of the 16 prices across time aren't at a certain level, but 17 there's variations that occur within that.</p> <p>18 Q I believe in your report you may 19 have referred to the treadmills at issue in this 20 case as the challenged products; is that correct?</p> <p>21 A I might have used that phraseology, 22 sure.</p> <p>23 Q Let's continue with that. Do you 24 have any understanding or knowledge of what range 25 of prices are paid by consumers for the challenged</p>
<p>1 that you see the treadmills sold for. But you see 2 variations around that. There's, you know, sale 3 prices on, you know, Black Friday or Cyber Monday. 4 Sometimes there might be other reasons why the 5 price can vary. But I still think it's sort of 6 market-determined. But, you know, Sole settles in 7 on a price. Dick's Sporting Goods settles in on a 8 price. I know Sole monitors what Dick's and 9 perhaps Amazon is doing, and if they see those 10 entities changing their prices, I think Sole during 11 the same period of time to remain competitive may 12 change its prices as well. So it's hard for me to 13 separate out the -- you know, the market-determined 14 factors versus just saying they're setting the 15 price. 'Cause I don't think they're setting the 16 price. They're taking into account everything I 17 talked about. And, yes, somebody ultimately has to 18 write with a magic marker on the price tag what's 19 the price, but that's influenced by, you know, 20 profit margins, cost of production, demand-side 21 competitive products, and then they settle into the 22 zone where they're going to sell their product.</p> <p>23 Q And with regard to Sole selling its 24 treadmills from its website, presumably, somebody 25 at Sole sets that retail price; correct?</p>	Page 54	<p>1 products?</p> <p>2 A Roughly speaking -- it's in my 3 report, but I'm going to do it from memory. But, 4 roughly speaking, I think, you know, around 999 5 recently -- most recent prices with the tariff 6 increases and everything. You know, could be 999 7 for the -- you know, some of the -- I don't want to 8 call them the lower end models 'cause I think even 9 the lower end models are highly rated. But the 10 less expensive models, you know, in the past have 11 gone 799 to 999 all the way up to, you know, even 12 \$2,500 or, you know, \$3,000. So we're talking 13 about a doubling or tripling of the range there, 14 depending on the attributes of the treadmills. I 15 can look up the exact numbers, but I know my range 16 is approximately right.</p> <p>17 Q Doesn't it always end in 99?</p> <p>18 A Generally I think so, yes.</p> <p>19 Q Did you make any determination of 20 the average price paid for the challenged products?</p> <p>21 A I think -- I mean, I've got some 22 time histories. For example, I think it's Exhibit 23 6 to my report. Let me look. Yeah, if you look at 24 Exhibit 6 to my report, you can see the 25 variability. But, you know, they're clustered</p>

<p>1 around that either 799 or 999 for the F63; and the 2 F80, you know, was around 1,499 to 1,599, depending 3 on the time period. But there's variability around 4 that. But I think those numbers that I gave you 5 would be, you know, a rough average. I haven't 6 calculated --</p> <p>7 Q That's a question I had -- I had a 8 question about this chart, and maybe you can answer 9 it for me. This says -- has the Monthly Average 10 Sales Price on Sole's Website; correct?</p> <p>11 A Correct. And I should have been 12 more specific on that, but that was from the 13 website, yes.</p> <p>14 Q Okay. So my understanding was that 15 for a long period of time the F80 was at 1,499.99, 16 and then recently, because of tariffs was the 17 stated reason, it went up to 1,599.99 as listed on 18 the website.</p> <p>19 A Yes. With some asterisks on that.</p> <p>20 Q Okay. And that's what I want to get 21 to. I want to get to the asterisks because I see 22 variability in this chart on the line that 23 indicates it's the sales price for the F80, and I 24 want to -- I want to get an understanding of 25 whether the website price as listed was always</p>	<p>Page 57</p> <p>1 said.</p> <p>2 Q Does this chart show variability 3 based on shipping, taxes or special offers, 4 something of that -- any of those?</p> <p>5 A It -- this would be the price of the 6 items is my understanding, if that's what you're 7 asking.</p> <p>8 Q Well, what I'm asking is, so the 9 price of the item, let's say, is generally 1,499.99 10 until recently. Does this chart reflect that 11 1,499.99 with adjustments for shipping and taxes, 12 or is this chart the list price that you get on the 13 website?</p> <p>14 A Yeah, I believe it's the -- well, 15 it's actually the revenues taken in from the items 16 that are sold that have that list price of 1,499.</p> <p>17 Q Okay. And do you know whether that 18 list price on the website prior to it going up to 19 1,599.99 during this period of time, January 2015, 20 till the 1,599.99 was it anything other than 21 1,499.99?</p> <p>22 A My understanding is, is that that 23 price could be adjusted for what Dick's is doing. 24 In other words, if Dick's is having a hundred 25 dollar off sale, my understanding is that Sole</p>
<p>Page 58</p> <p>1 1,499.99, but there was some other factors that 2 caused it to vary a little, or whether there was a 3 change in the listed price?</p> <p>4 A Yeah, I -- I'm going to give you the 5 best answer I can. That I don't disagree with you 6 in terms of what those predominant prices are, but 7 I think there's times that Sole will monitor what 8 Dick's is doing, and they try to keep their prices 9 -- online prices in harmony with what Dick's may be 10 selling the products for. So I gave you two 11 examples that generally -- you know, just as an 12 example, you know, on the Black Monday -- I'm 13 sorry. The Cyber Monday and the Black Friday, it's 14 not infrequent that there's hundred dollar 15 reductions off of -- off of that price that we've 16 been talking about. Or there could be situations 17 where I think someone may call Sole, and for a 18 variety of reasons may be successful at negotiating 19 a slightly different price. That's my 20 understanding. But this data that we're showing 21 here is what I'll call the weighted average price. 22 In other words, basically the revenue is divided by 23 the units, and it's showing some variability. But 24 my understanding is that there could be that 25 variability for some of the reasons that I just</p>	<p>Page 60</p> <p>1 wants to make sure that -- in a sense that they're 2 not competing pricewise with their own models in a 3 sense. So they monitor what Dick's is doing, and 4 then adjust their prices accordingly. That's my 5 understanding.</p> <p>6 Q So they would change that on the 7 website. If let's say Dick's was offering it at 8 1,399.99, you're saying that Sole would adjust that 9 on its website so that it's offering it at 10 1,399.99?</p> <p>11 A Or at least somehow communicate to 12 consumers that there was the hundred dollars off, 13 yes.</p> <p>14 Q Okay. Let's go back to hedonic 15 regression.</p> <p>16 A Okay.</p> <p>17 Q You'd agree that's a generally 18 accepted technique?</p> <p>19 A Sure.</p> <p>20 Q And the general concept is that you 21 can decompose the price of a product into price 22 components that are attributable to certain 23 attributes?</p> <p>24 A Properly implemented, yes. I think 25 I would agree. That's the intention, yes.</p>

<p>Page 61</p> <p>1 Q And I know you haven't done this, 2 but do you have any plans to conduct a hedonic 3 regression to determine whether the price of the 4 challenged treadmills would be lower with a 5 disclosure of the allegedly true horsepower amount 6 rather than without the disclosure?</p> <p>7 A I can even answer maybe a simpler 8 question that I don't have any plans to do any 9 hedonic regression at this point in time.</p> <p>10 Q That is a simple question. Thanks. 11 And I may have asked you this already, 12 and if I did I apologize, but do you believe -- I 13 think you've already testified that the answer is 14 no, but I'll ask it again.</p> <p>15 Do you believe that a hedonic regression 16 could be used in this case to determine whether the 17 price of a challenged treadmill would be lower with 18 disclosure of the allegedly true horsepower?</p> <p>19 A I want to make sure I have the 20 question properly. One of the "no" answers I gave 21 previously was that this case from my economic 22 training tells me that you need individual inquiry, 23 and you can't just do a common proof approach. So 24 that's the no answer. 25 Maybe -- I apologize. I might have</p>	<p>Page 63</p> <p>1 performed from start to finish.</p> <p>2 A Yeah, I haven't done one from 3 scratch because in the nature of the cases I've 4 been retained on, it was my opinion that individual 5 inquiry dominated over a common proof approach. So 6 I wouldn't do something that I knew was not 7 appropriate. But that doesn't mean that I'm not 8 well versed in it, and that doesn't mean that other 9 experts haven't tried it. And so that's when I 10 said I evaluated what other experts felt was 11 appropriate that I disagreed with, and then also, 12 you know, critiqued or evaluated those analyses.</p> <p>13 Q Other than in the litigation 14 context, have you ever conducted a hedonic 15 regression analysis from ground zero?</p> <p>16 A Actually, my profession, my career 17 is -- I call myself a forensic economist and damage 18 quantifier, so 95 percent of the work that I do is 19 in a dispute environment. So it's hard to speak 20 outside of the dispute environment 'cause that's my 21 area of specialization.</p> <p>22 Q Right. And in that other five 23 percent outside of the litigation context, have you 24 ever conducted a hedonic regression from ground 25 zero?</p>
<p>Page 62</p> <p>1 really missed the thrust of your question. 2 Q Sure. And I assume because that 3 answer was the no answer that it would, therefore, 4 follow -- maybe it doesn't -- that you couldn't do 5 a hedonic regression in your view to determine 6 whether the price of the challenged treadmills 7 would be lower with a disclosure of the allegedly 8 true horsepower amount than without such a 9 disclosure?</p> <p>10 A Yeah, I haven't -- I haven't 11 attempted that. I think it would be a very 12 complicated analysis. But my ultimate opinion is 13 that you need individual inquiry. You know, if you 14 were going to try to do something with an 15 econometric hedonic regression approach, I think 16 you would -- I think that would take a lot of work 17 with an uncertain outcome.</p> <p>18 Q Have you ever performed a hedonic 19 regression analysis in a consumer class action 20 case?</p> <p>21 A Yes. Yes, either performed or 22 evaluated or rerun a hedonic regression. So the 23 answer is yes to those.</p> <p>24 Q All right. Let's take out the 25 "evaluated or rerun" and just go with ones you</p>	<p>Page 64</p> <p>1 A I don't believe so, no. 2 Q You would agree that the function of 3 a properly performed hedonic regression analysis is 4 to break out the attributes of a product; correct?</p> <p>5 A I wouldn't have phrased it that way. 6 I might understand the spirit of what you're trying 7 to get to, but it's trying to decompose the price 8 of a product and that which is attributable to the 9 various components that make up the product.</p> <p>10 Q And the components that make up the 11 product you're talking about, would that be the 12 attributes?</p> <p>13 A Yes. 14 Q Would you agree that a properly 15 performed hedonic regression analysis can determine 16 the value of a particular product attribute?</p> <p>17 A That's what the intention of it is. 18 I mean, we can all have varying degrees of, you 19 know, perceptions of the success of that and does 20 it make sense. So there's two different levels. 21 One is, you know, can you mechanically run a 22 hedonic regression and get the computer to spit out 23 an equation? Yeah, absolutely. Then the next 24 thing is, well, taking it from a mechanical result, 25 does it make proper intuitive results and is the</p>

<p>1 model properly specified? Can we rely on the 2 model? You know, that's where, obviously, judgment 3 comes into play as well, but I won't disagree that 4 that's the intention of the technique. 5 Q And to get to the point you just 6 made, while hedonic regression analysis may appear 7 to be scientific, it's, in fact, very much an art 8 form; would you agree? 9 A I'll agree 100 percent with you. 10 That's also true of a lot of econometrics in 11 general. You know, there's regressions outside of 12 hedonic regression, but there's always judgment of 13 the modeler that goes into it and which variables 14 to include. There's explanatory variables and 15 those sort of things. So, yes, it appears to be -- 16 it's statistics and it's math, and so, you know, it 17 must be rigorous. But, you know, you need to take 18 care in development of the model and the 19 interpretation of the results. 20 Q And you just talked about 21 explanatory variables. Is there an industry 22 standard or anything of that nature to determine 23 what must be included as explanatory variables? 24 A Well, you would want -- let's try it 25 this way. I'm trying to figure out the best way to</p>	<p>Page 65</p> <p>1 dominates, and so I wouldn't do an approach that 2 yields a common proof approach. 3 Q And so based on that, would it be 4 fair to say that you don't believe a conjoint 5 analysis could be used to determine classwide 6 damages in this case? 7 A That's correct. Now, there's two 8 aspects. And you may or may not have asked this, 9 but there's the proposal of Mr. Gaskin, and there's 10 issues with that, but then there's just the overall 11 opinion that individual inquiry is required. 12 Q And so that's what I wanted to get 13 at, and part of which is to say, you may have issue 14 with how Mr. Gaskin proposes to do -- implement a 15 conjoint methodology, but the bottom line is, 16 regardless of how he implements that methodology, 17 in your view individual inquiries are necessary. 18 And, therefore, no conjoint type of analysis could 19 yield some method of common proof? 20 A I think I would agree with how you 21 stated it, yes. 22 Q I don't think we've talked about 23 this yet. Are you familiar with the survey 24 methodology contingent valuation? 25 A Yes.</p> <p>Page 67</p>
<p>1 answer this. There's no cookbook approach that 2 gives you the answer. But I want to be careful in 3 saying that if there were a cookbook approach, the 4 cookbook approach would be, well, you need the 5 proper determinants. You need the proper 6 explanatory variables to explain whatever 7 variations you may see in the dependent variables. 8 So that's the guiding principle. But going beyond 9 that, you know, it's not like there's this list of 10 what you include, if I'm interpreting your question 11 properly. So that -- I'm sorry. Go ahead. 12 Q How would you determine the proper 13 explanatory variables for hedonic regression? 14 A I mean, I think you'd look at a lot 15 of the things that I have in my report in terms of, 16 you know, what are the drivers of, you know, price 17 variability. And so, you know, that would be, you 18 know, an important consideration. 19 Q And we may have talked about this 20 before, but you didn't do any -- have not done a 21 conjoint analysis of any type in this litigation; 22 correct? 23 A That's correct. For the reasons 24 that I said before that, you know, in my mind from 25 an economic perspective the individual inquiry</p> <p>Page 66</p>	<p>1 Q What is that? 2 A I think, you know, it's just another 3 sort of survey technique. You know, I view 4 contingent valuation of more just sort of asking 5 people what they would pay as a price versus trying 6 to tease out with a conjoint analysis through a 7 series of questions how they might value an 8 attribute. I'm sure that's not the formal answer, 9 but that's how I think about it. 10 Q Fair enough. And would it be fair 11 to say that you don't believe a contingent 12 valuation could be employed in this case to 13 determine classwide damages on a common proof 14 basis? 15 A Yes, so I would -- yes, I would 16 agree with that. Maybe just expanding on the 17 answer a little bit, 'cause a lot of these 18 techniques that we're talking about deal with sort 19 of willingness to pay as opposed to a 20 market-determined price difference, if that makes 21 sense. In other words, one way that I think about 22 it is -- I'm not sure where you're located, but I'm 23 down in Texas, and we get 30 straight days of a 24 hundred degree weather. And I'd be willing to pay 25 -- willing to pay, you know, five dollars for a</p> <p>Page 68</p>

<p>1 bottle of water walking down the street, but I only 2 have to pay \$1.25 because of competition and the 3 market environment and everything else. So the 4 point I'm trying to make is, if you asked me, I 5 might say, "Hey, I'm willing to pay five dollars 6 for that bottle of water," but I only have to pay 7 \$1.25 when I go to the Circle K or the 7-Eleven. 8 And so that's the difference between willingness to 9 pay and market price or changes in price or changes 10 in willingness to pay. 11 And I'll put a punctuation point on this, 12 and then I'll stop. But market values to an 13 economist is determined by prices, and so these 14 techniques don't necessarily yield a price or a 15 change in price as opposed to a willingness to pay. 16 That's the issue, if that made sense. 17 Q Are you familiar with treatment and 18 control experiments? 19 A I'm not sure with the same 20 phraseology that you might have used, but, yes, I'm 21 familiar with control groups and those types of 22 phenomenon or techniques. 23 Q And what do you understand to be the 24 nature of that technique? 25 A And I'm not sure if we're talking</p>	<p>Page 69</p> <p>1 the appropriate disclosures been made? So assuming 2 the veracity of plaintiffs' allegations -- 3 A Yeah. 4 Q -- let's just take an example. 5 Let's suppose the plaintiffs' allegation is that no 6 matter what they say, the horsepower of the motor 7 is limited to 2.4. So let's take that. And is 8 there an analysis you could do to determine what 9 the price of the treadmills would have been had the 10 disclosure been made "when we say 3.5 horsepower, 11 you're really only going to get 2.4"? 12 A Right. And I said this before, and 13 I think you understand this; but my prefacing 14 comment is, so now my ultimate opinion is the need 15 for individual inquiry as opposed to common proof. 16 I take your question to be put that off to the 17 side, and now we're just sort of doing this 18 analytical analysis of what are the price of 19 treadmills with 3.5 versus 2.4 horsepower motors 20 regardless of this issue of the need for individual 21 inquiry. So I'm putting that off to the side. So 22 I think that's the question you're asking me. And 23 I think I would default back to, you know, what I 24 talked about before is could you -- is there any 25 way either through a benchmarking approach or a</p> <p>Page 71</p>
<p>1 about the same thing, but it's not uncommon in 2 survey techniques to have a control group and a 3 test group just to see what the differences are and 4 whether there's meaningfully different results. 5 Q How would that differ from 6 contingent valuation? 7 A You may or may not have a control 8 group I don't think necessarily. I mean, I think 9 it just depends, you know, on the procedures that 10 the surveyor wants to follow. 11 Q And would it be fair to say that you 12 do not believe that a treatment and control group 13 type approach here would yield any classwide 14 determination of damages? 15 A I mean, for all the reasons that 16 I've said before, unless -- unless there's 17 something in your question I'm missing or unless 18 there's a way you're going to tweak, you know, the 19 approach or something to take into account 20 something that would yield, you know, a claimed 21 price difference or price premium as opposed to 22 just a willingness to pay. 23 Q Is there any type of methodology 24 that you could employ in your view in this case to 25 determine the price of the challenged product had</p> <p>Page 70</p>	<p>1 before and after approach? I mean, those are -- 2 what I told you before in terms of how you might do 3 it would sort of be the default positions to which 4 you would then try to do the analytics. So you 5 might look at -- you know, you might look at costs 6 of production. You might look at costs of input. 7 You might look at over time when there's a change 8 of an input cost does that result in the change in 9 the price of the output? 'Cause sometimes profit 10 margins can change as well, so it's not necessarily 11 a dollar-for-dollar push-through of a change in 12 costs. You might -- obviously, you need to take 13 into account not only the supply-side 14 characteristics, but the demand side. You know, is 15 there a demand for the 3.5 over the 2.4? Or once a 16 consumer understands that a 3.5 is the same as a 17 2.4, and when they get on the treadmill the speed 18 is the same and everything else is the same, it may 19 not have an impact on the price once they realize 20 that the capabilities and the output are the same, 21 if that's what you're asking me to assume. So to 22 the extent that people are buying the benefits that 23 flow from a particular product, then it may not 24 have an impact at all. So that's why you've got to 25 look, you know, at supply-side factors and</p> <p>Page 72</p>

<p>Page 73</p> <p>1 demand-side factors. So those are the things I 2 think about. I haven't done that separate study, 3 but those are the types of things that you would 4 think about.</p> <p>5 Q You're not offering any opinion, nor 6 do you intend to offer an opinion, as to what the 7 price of the treadmills would be had what plaintiff 8 alleges appropriate disclosures been made?</p> <p>9 A I don't think I've done -- that 10 analysis is not in my report. I haven't been asked 11 to do that analysis. But I've just tried to give 12 some guidance. You know, if I was asked, I'd give 13 the same guidance, the same answer as I gave to you 14 that -- you know, my prior answer had a lot of 15 different things that you'd consider, but I have 16 not done that analysis.</p> <p>17 Q As you sit here today, do you 18 believe that there would be any change in the price 19 of the treadmills had what plaintiff alleges to be 20 the appropriate disclosures been made?</p> <p>21 A So I haven't done that analysis, but 22 to the extent that consumers look to the 23 performance of the treadmills and may not fully 24 understand what does 3.5 mean versus 3.0 versus 25 2.6, but if there was a certain treadmill that had</p>	<p>Page 75</p> <p>1 probabilistically that as an economist the flow of 2 services from the treadmill that we're talking 3 about is the same. So, probabilistically, if I did 4 the analysis and I got a different result, I'd 5 really want to understand why because my a priori 6 expectation would be that the flow of services are 7 the same, and so I would wonder why you are getting 8 a difference. But I want to be a little careful, 9 too, because I didn't give you all of the 10 determinants of that because you'd also have to 11 look at competition in the marketplace and 12 everything else. So that's why I'm saying I 13 haven't done that study. But if everybody's had 14 the same effect, you know, again, probabilistically 15 -- or if everybody's had the same relabeling of 16 their horsepower motor, again, that would move the 17 needle towards the likelihood the price would not 18 be different.</p> <p>19 Q You haven't performed any analysis 20 to determine if any consumers would not have 21 purchased the challenged treadmills had appropriate 22 disclosures been made; correct?</p> <p>23 A I have not done an analysis -- I'm 24 sorry. I just need your -- so alleged appropriate 25 disclosures, but I need a little bit more</p>
<p>Page 74</p> <p>1 a certain performance level, that goes into the 2 price of the treadmill. So I don't think you're 3 telling me the performance level's changing at all. 4 The treadmill is what it is. They're getting the 5 exact same treadmill. It's just that instead of 6 saying 3.5, it might say 2.4. But if the 7 performance is identical, that's what people are 8 paying for, and so I would be very, very careful in 9 the analysis to take that into account. I've 10 reached no determination. I haven't done that 11 study. But I'm at least letting you know the pause 12 I would have or at least an area of inquiry that I 13 would be thinking about from an economic 14 perspective in the sense that the product would be 15 identical to what they're getting at the existing 16 price they paid for it.</p> <p>17 Q And based on that the product's 18 identical, it's just the consumer finds out it's 19 not 3.5, it's 2.4, as you sit here today in your 20 opinion you don't believe there would be any price 21 change based on that disclosure?</p> <p>22 A Yeah, I -- no, actually I said 23 something a little bit more specific. I said I 24 haven't done that analysis, so I'm not going to sit 25 here and say one way or another. But I can answer</p>	<p>Page 76</p> <p>1 specificity on your question. Maybe just say it 2 again. There's a reason why I'm hesitating a 3 little bit. I just need the question again.</p> <p>4 Q You haven't performed any analysis 5 to determine if any consumers would not have 6 purchased the challenged treadmills if appropriate 7 disclosures from plaintiff's perspective had been 8 made?</p> <p>9 A I have not done that analysis, no.</p> <p>10 Q Similarly, you have not done any 11 analysis to determine whether fewer units of the 12 challenged treadmills -- or how many fewer units of 13 the challenged treadmills might have been sold if 14 appropriate disclosures from the plaintiffs' 15 perspective had been made?</p> <p>16 A Those -- your two questions are 17 close cousins.</p> <p>18 Q Right.</p> <p>19 A So, yeah, I have not done that 20 analysis. But, you know, again, that all goes to 21 the individual inquiry issue, too.</p> <p>22 Q Have you performed any analysis or 23 conducted any research as to how Sole would behave 24 in the marketplace if demand for the challenged 25 products decreased by let's say 30 percent?</p>

<p>1 A I'm missing -- have I done any 2 analysis of that? 3 Q Right. 4 A I mean, I've looked at the sales 5 patterns over time. And, obviously, you know, with 6 the COVID-19 pandemic, I mean, sales have increased 7 substantially. You know, I think they've like 8 doubled or tripled. So we know that they other 9 than the China tariff -- they've increased 10 production, and except for the tariff, you know, 11 prices have remained constant. I would note that 12 if you took that -- you know, if you went back a 13 year, there was less production, less sales, less 14 demand. You know, prices were, you know, clustered 15 around that 1,499 level, although with some 16 variability depending on the seasonality and so 17 forth. So if as an economist I wanted to make some 18 predictive statements, I would look to what I was 19 just talking about. But I think we see nuggets of 20 good information there just given, you know, what's 21 happened with the pandemic. 22 Q How would you go about determining, 23 if you could, what effect let's say a 30 percent 24 decrease in demand for the challenged product would 25 have on Sole's behavior in the marketplace?</p>	Page 77	<p>1 whole semester of microeconomics in two minutes 2 there, but those are all the things you need to 3 consider. 4 Q To your knowledge, did Sole ever 5 sell its products below its cost? 6 A I might have to put more of a 7 description on it. But I know that there's either 8 returned products or allegedly damaged products or 9 products with damaged packaging that got sold at 10 relatively low prices. So that has happened, but 11 those would be under those unique circumstances. 12 Q Do you know whether any of those 13 sales were below cost? 14 A Well, I think I've seen some data 15 where some of them were sold for like \$300. And I 16 can't tell you exact cost of production, but I'm 17 fairly confident the cost was greater than \$300. 18 Q And that data was provided to you by 19 Sole? 20 A I think that was in -- if you look 21 at some of the spread sheets that were produced in 22 the case, I think occasionally you see some prices 23 that appear to be very different than -- where a 24 lot of units are sold, the prices that are very 25 different are on a limited number of sales. And so</p>
<p>1 A It's a little bit easier if I can 2 just talk generally about kind of the hypothetical. 3 But if, you know, price -- let's take it this way. 4 Some tenants of microeconomics, and within 5 microeconomics there's the theory of the firm and 6 theory of consumer behavior. Theory of the firm is 7 the supply side of the market. Theory of consumer 8 behavior is the demand side of the market. So if 9 there's a decrease in demand for a particular 10 product in the marketplace, there could be downward 11 pressure on price, except that not only do firms 12 have to maximize profits, but they have to make 13 what's called a normal rate of return. Now, what 14 does that mean? When a firm makes a normal rate of 15 return, that's the proper return that will keep the 16 resources in a particular market. If you don't 17 make a return to keep the resources in a particular 18 productive activity, firms exit the market, and 19 that has price effects as well. So there's 20 long-run and short-run effects. But depending on 21 changes in demand, that could affect the 22 profitability of the product, and then you'd also 23 look at what's happening in the price effects and 24 as firms remaximize profits. So it's -- 25 unfortunately, I've just given a tutorial on a</p>	Page 78	<p>1 I inquired about that as to what was going on, and 2 one of the explanations I got was that occasionally 3 when a treadmill is shipped to a customer the 4 package may be damaged and the customer, you know, 5 takes that as a bad sign and wants a replacement 6 product. And so the original product is sent back, 7 and that's when -- that may be sold at a reduced 8 price. 9 Q Do you know whether any retailers 10 have sold Sole treadmills below cost? 11 A I don't know one way or another. 12 Q Has Sole asked you to estimate what 13 its exposure might be if liability is established 14 in this case? 15 A No. 16 Q If Sole asked you to do that, how 17 would you go about doing it? 18 A I think it might depend on the stage 19 of the case, but one measure of good exposure is, 20 you know, what is the -- you know, what are the 21 plaintiffs saying? You know, if they ever do their 22 analysis and multiply things out, you know, there's 23 that number. But then you could take a 24 probabilistic approach of, okay, what's the 25 probability of various outcomes? So that's almost</p>

<p>Page 81</p> <p>1 more of a decision tree type approach. I know I've 2 done such things in the past. I don't remember 3 which cases, but occasionally I'm asked to do that. 4 Haven't been asked to do that here, but those are 5 the types of things that you could do. You could 6 even make a matrix, you know, where you have 7 various changes in prices and various units and so 8 forth.</p> <p>9 Q All right. Let's switch topics. 10 Does what a consumer believes about Sole 11 treadmills' horsepower claims change what they pay 12 for the product at retail?</p> <p>13 A It depends.</p> <p>14 Q Would you agree with me that 15 generally consumers cannot negotiate prices for 16 consumer products in retail outlets?</p> <p>17 A Actually, I have to put an asterisk 18 on that answer because it's not quite the same. 19 You don't go into Dick's and say, "Hey, it says 20 1,599, and I only want to pay, you know, 1,500." 21 But there are ways that consumers do effectively 22 negotiate. Now, how do they effectively negotiate? 23 They wait for the product to be on sale. They 24 don't buy today. I'll come back. I'll come back 25 in a month, or I'll check every couple of months,</p>	<p>Page 83</p> <p>1 of that price. 2 Q Right. 3 A Just to make sure where we're 4 speaking. Whereas, the loyalty points and the 5 reward dollars would come off of a future purchase, 6 but you would be saying to yourself, "Hey, I'm 7 actually getting it for \$50 less because they're 8 giving me a \$50 store credit on another item." 9 Q And, generally speaking -- and I 10 think we've already nailed this down -- you can't 11 go into Dick's and negotiate 'em down from the 12 1,599.99 apart from score card points or Cyber 13 whatever deals? 14 A I'm going to say I agree with you 15 for like 99.9 percent of the occurrences. Once in 16 a while, because I've even done this, where you 17 walk in and you say, "Hey, it's scratched," you 18 know, or you're getting rid of a floor model and 19 you might be able to strike a one-off deal, but 20 that is not a general occurrence. 21 Q And I want you to assume, 'cause you 22 may not remember, but let's assume that a Sole F85 23 has a higher horsepower than a Sole F80. 24 A Okay. 25 Q All right. Which it, in fact, does.</p>
<p>Page 82</p> <p>1 or I'll wait till the Friday after Thanksgiving. 2 Or, you know, they usually have a sale around 3 Christmas, so I'll wait till then. Or I'll sign up 4 for their rewards program, and I get \$50 off or I 5 get 1,500 points. So that gives me a different 6 price. So they don't go in to negotiate, but 7 consumers effectively, you know, in a sense can 8 vote with their dollars by behaving in ways that 9 I've just suggested. So it's not like, you know, 10 they're just always stuck with that price.</p> <p>11 Q But apart from promotions and 12 discounts which may be there from time to time, for 13 the most part places like Dick's give you a 14 take-it-or-leave-it price; right?</p> <p>15 A I think I would agree with that. I 16 don't know that's quite true on the Sole website, 17 but, yes, I'm not -- generally speaking, you don't 18 walk into a retail store and tell 'em, "Hey, I'll 19 buy it. Give me ten percent off" or something.</p> <p>20 Q And any coupons or rebates, those 21 would come off of the shelf price or retail price?</p> <p>22 A So a -- I want to say yes. I want 23 to make sure I have your question. So when I walk 24 into Dick's and it says 1,599, if it's Cyber Monday 25 or Black Friday, it might be a hundred dollars off</p>	<p>Page 84</p> <p>1 And let's say you have a consumer who has an 2 affinity for higher horsepower treadmills like the 3 F85. That consumer who has a preference or 4 affinity for higher horsepower pays the same amount 5 for the F85 as someone who doesn't have that 6 affinity or preference; correct?</p> <p>7 A I'm staying within the construct of 8 your hypothetical, but, yes. 9 Q Basically the guy who cares about 10 the higher horsepower treadmills can't negotiate 11 his own price? And that would be the same with the 12 guy who cares about it or the guy who doesn't care 13 about it, they all pay the same market price?</p> <p>14 A I think I would agree with you. I'm 15 getting confused by the question a little bit 16 because who would be negotiating a higher price 17 versus a lower price? 18 Q Regardless of whether you want a 19 higher horsepower or not a higher horsepower, 20 you're all going to pay the market price?</p> <p>21 A You will pay the price, although 22 consumers and the market are -- you know, to an 23 economist are marvelous things in the sense that if 24 for some reason you think the -- you don't have an 25 affinity for the 3.5, but you like the rest of the</p>

<p>1 machine and you think the price is a little too 2 high, you can just wait until it's on sale. You 3 can wait to get the hundred dollars off. 4 Q Generally speaking, individuals, 5 consumers can choose to pay the price that's being 6 offered for it that's on the shelf or choose not to 7 buy it; right? 8 A Yeah. Sometimes when you're 9 speaking generally, I don't know if you mean not 10 buy at all or go to an alternative product. That's 11 sometimes why I hesitate. So I'm not sure which 12 direction you're going. But for a particular 13 product, it is always true that the willingness to 14 buy or your willingness to spend has to be greater 15 than or equal to the market price. Otherwise you 16 don't buy. If your willingness to spend is below 17 the market price, that's when you don't buy. So it 18 is always true that you will buy when the 19 willingness to buy is greater than the market price 20 or equal to the market price. 21 Q And if a customer paid \$2,200 -- 22 let's take a more realistic number. 2,399. If a 23 customer paid 2,399 for a treadmill from a 24 particular store on a particular day, but could 25 have paid 1,999 for the same treadmill on that same</p>	Page 85	<p>1 farmer the wheat came from. And the likelihoods 2 are that the prices for that wheat are going to 3 converge to the same price. You're not going to 4 see -- holding everything else constant, you're not 5 going to see difference in prices there. Well, 6 firms want to compete, and so now instead of 7 talking about wheat let's talk about treadmills. 8 And so I want you to buy my treadmill, you know, 9 more than the other guy's treadmill. And so you 10 may have attributes in your product that make your 11 product a little bit different than the other guy's 12 treadmill or their product. So that's what we mean 13 by product differentiation. Is there something 14 that will differentiate your product from the 15 competitive product that increases the probability 16 that the consumer will desire, demand or buy your 17 product over the competitor's product? 18 Q So companies may engage in product 19 differentiation to either sell more product or sell 20 it at a higher price? 21 A There could be price effects or, 22 frankly, the price effects could go either 23 direction. Could go a higher price or a lower 24 price, depending on the differentiation. I mean, 25 so the easiest way to think about it is, you know,</p>	Page 87
<p>1 day, wouldn't the customer be better off paying 2 1,999 than 2,399? 3 A Yeah, it is always true. So I'm not 4 going to debate this or disagree with you, I guess. 5 It is always true that, yeah, you would always 6 prefer to buy it -- assuming everything else is 7 held constant and there's no quality differences, 8 you know, there aren't any differences of 9 availability or when it gets shipped to you, you 10 know, because there's always complexities; but 11 holding everything in the world constant, yes, 12 consumers would prefer lower prices rather than 13 higher prices. 14 Q You talked a little bit earlier 15 about product differentiation. 16 A Yes. 17 Q And can you explain again what do 18 you mean by product differentiation? 19 A Yeah, maybe the easiest way to give 20 it is through an example. So you could think of 21 two different farmers, and both farmers produce 22 wheat. And you take the wheat from one farmer, put 23 it in a bucket. You take the wheat from another 24 farmer, put it in a bucket. You know, you can 25 switch the buckets around, and you won't know which</p>	Page 86	<p>1 we talk about the quality of different items. 2 That's not necessarily bad because not everybody 3 wants to buy the highest quality item. Some people 4 -- you know, there's premium products. There's the 5 regular products. And I think sometimes there's a 6 euphemism of value products, but those might be, 7 you know, the I hate to say lesser quality products 8 because people will want to pay a lower price for 9 those, but that is what they want. But, yes, I 10 mean, the differentiation can go in a lot of 11 different directions. 12 Q Would you agree that one way for a 13 treadmill producer to differentiate its product 14 would be with regard to horsepower? 15 A That either could be a way to 16 differentiate -- and the part that I can't speak to 17 -- or there may be a reason why certain treadmills 18 their design has a higher horsepower than other 19 treadmills. And at this point it's now getting 20 into the engineering side that I don't know, but it 21 may be that bigger treadmills require more 22 horsepower than smaller treadmills. I don't know. 23 But there could be a way to differentiate where 24 everything else is the same, but you have a 25 different horsepower, or it could be in your</p>	Page 88

<p>1 differentiating process that it may require higher 2 horsepower. I just don't know the answer to that 3 latter point. 4 Q And all other things being equal, 5 you'd agree that there's a difference between a 6 treadmill that makes a higher horsepower claim than 7 one that doesn't? 8 A From a -- 9 Q From a product differentiation 10 standpoint. 11 A Yeah, I was going to say it's almost 12 tautological. Yes, one -- you know, tautologically 13 and physically, yes, one has a 3.5 horsepower 14 motor, the other has a 3.0. So there's a 15 difference. Now, my hesitation was the perceptions 16 of consumers, the benefits that flow from it, the 17 performance of the treadmill. I'm putting that all 18 off to the side. But physically and 19 technologically, yes, that's a tautological 20 statement. 21 Q I'm good with tautological 22 statements. 23 Doctor, it's 12:16. Do you want to take 24 a break now? We've been going about an hour. 25 A Yeah, that's great. About every</p>	<p>Page 89</p> <p>1 Q Different topic. In writing your 2 report, were you given any assumptions on which to 3 rely? 4 A I don't remember being given any 5 assumptions, no, I don't think so. 6 Q Did you rely on any assumptions in 7 reaching your opinions? 8 A I'm trying to figure out how far 9 you're taking that, but I'm assuming, for example, 10 when I got information as to sales or what's been 11 produced in discovery that that was accurate 12 information. That was an assumption. 13 Q Okay. We may go into this in a 14 little more detail later, but did you make any 15 assumptions with regard to liability in this case? 16 A I don't think I -- it's sort of an 17 open question. Regardless of whether there's 18 liability or not, you know, the question is -- that 19 I was trying to evaluate is have the plaintiff 20 experts, Mr. Gaskin and Mr. Weir, you know, 21 proposed reliable methodology for evaluating 22 classwide damages using common proof? And, you 23 know, I didn't need to -- I don't think I needed to 24 make any liability assumptions associated with 25 that. And then my investigation as to whether I</p> <p>Page 91</p>
<p>1 hour I like that. So appreciate it. 2 Q Do you want to take a lunch break 3 now for maybe a half an hour, or do you want to 4 just take a short break? Either is fine by me. 5 A You're on the East Coast, I take it? 6 Is that where you are? 7 Q Yes. But it's up to you. I don't 8 think I'm going to be eating anything, so -- 9 A How about if we take a five- or 10 ten-minute break, come back for maybe, yeah, 11 another hour session, and then we'll take our lunch 12 break then, if that works for you. 13 Q That's fine. 14 (Whereupon, a recess was taken.) 15 Q Dr. Ugone, you would agree that the 16 claimed damages in this case is the difference 17 between what consumers paid for the challenged 18 treadmills as they actually existed during the 19 class periods and what consumers would have paid in 20 a but-for world where what we believe to be proper 21 horsepower disclosures were made? 22 A I believe I agreed that it would be 23 -- to the extent that, yes, the damages are a 24 claimed price premium measure of damages, I agree 25 with you, yes.</p> <p>Page 90</p>	<p>1 felt whether individual inquiry would be required 2 to analyze that concept, I don't think I had to 3 make any assumptions. It's not like in other 4 cases. Sometimes in other cases you assume 5 liability, or you never get to the damages 6 question. Here it's a slightly different question 7 that's being asked. 8 Q Here in making your -- giving your 9 opinions with regard to damages, did you assume 10 that plaintiffs could prove liability? 11 A I'm assuming there's a dispute, and 12 that the plaintiffs view that they have a valid 13 case, and that's what they're going to try to set 14 out to do, yes. But, again, I don't know that I -- 15 I view this class certification stage a little bit 16 different than if you're, you know, in a merits 17 phase. I don't know if that explains it or not, 18 but, I mean, I don't know whether you can prove it 19 or not. The question is -- you know, is does the 20 difference you're talking about has that created a 21 price effect? 22 Q Trust me. We got this on liability, 23 so we can just -- Thomas may disagree. I don't 24 know. 25 With regard to the Gaskin survey, if I</p> <p>Page 92</p>

<p>1 understand it, one of your opinions is that his 2 post survey would be a measure of willingness to 3 pay? 4 A Correct. Yes. And before I kind of 5 said "willingness to buy" a couple of times. I 6 just was using those interchangeably, but 7 willingness to pay is a better thing to say, yes. 8 Q And would that be -- is it your 9 understanding that his survey would give you a 10 calculation of an individual willingness to pay? 11 A No. I think he's coming up -- I 12 think it ultimately will yield sort of an average 13 -- an average willingness to pay across all the 14 consumers from -- as dictated by his survey 15 results. 16 Q And how do you define the term 17 "willingness to pay" generally so we're on the same 18 wave length? 19 A I'm trying to put this in a layman's 20 way to think about it, but if you might have demand 21 for a particular product that has a set of 22 attributes. And where it's a little bit harder, 23 when you're talking about the demand for a product, 24 you're talking about, you know, a whole bunch of 25 different prices and a whole bunch of different</p>	<p>Page 93</p> <p>1 that they might be willing to pay four dollars. 2 But, again, that's a willingness to pay. That's 3 not a market-determined price. 4 Q Using Mr. Gaskin's survey results, 5 could you calculate an individual's willingness to 6 pay? 7 A I think in the deep down inside of 8 his results he might have that because there's -- 9 he'll have a number of survey participants that are 10 ultimately being aggregated together for his final 11 number, but he has the individual results. So I 12 don't know if he would report that, but he probably 13 could do some sort of calculation to figure that 14 out. 15 Q Switching topics. Do you believe 16 that a product can be produced for a cost of X and 17 have a market value that's less than X? 18 A Yes. And that's -- in the long run, 19 that's when that product isn't produced anymore. 20 Q And how does that generally happen? 21 A Which part of it? Companies go out 22 of business. 23 Q I mean, how does that generally 24 happen that you have a product that's produced for 25 X and it's sold or has a market value of less than</p> <p>Page 95</p>
<p>1 quantities demanded. In other words, how much 2 would be demanded at each of those prices. But 3 when you talk about demand, that's giving you the 4 entire schedule. It's not just one price and one 5 quantity demanded. So that makes it a little 6 confusing. But you might think of demand for 7 product A, and then you might think of demand for 8 product A primed, where A primed is the same as A, 9 except for one attribute. And let's just say the 10 demand for product A primed, so minus an attribute, 11 is less than the demand for product A. Generally 12 when you're talking about willingness to pay, 13 you're talking about that willingness to pay that 14 difference between the demand curves. Now, that's 15 not a difference in market price 'cause you don't 16 have supply in there 'cause you need supply and 17 demand to interact to determine the market price. 18 So when you're looking at differences in 19 willingness to pay, that's sort of the difference 20 in the demand curves for the two products. 21 Maybe an easy way to say it is, you know, 22 like I said before, you know, that, you know, under 23 one set of circumstances people might be willing to 24 pay five dollars for a bottle of water. Under 25 another set of circumstances the demand is such</p> <p>Page 94</p>	<p>1 X? 2 A I mean, if you think about it, 3 there's cost of production. And so there's the 4 price of labor, there's the price of capital, 5 there's the price of raw materials. And then the 6 existing level of technology is how you combine 7 your inputs to get output. So basically from the 8 firm side you have technology, you have the labor, 9 you have the capital, and you have the raw 10 materials in a very simple way of talking about it. 11 And it could just be -- who knows? -- the price of 12 labor is too high to put the product together 13 relative to what people will spend for the product. 14 Or, you know, the price of, you know, whatever an 15 input, steel or the price of aluminum or, you know, 16 if you're having implants put in your mouth for a 17 tooth, the price of the titanium screw is too high. 18 It could just be then the cost of making the 19 product. Unless there's future technological 20 changes, the price of making the product is higher 21 than what people want to spend to buy that product. 22 Q Let's picture a typical graph of 23 supply and demand, and such graph usually reflects 24 the downward sloping demand curve and upward 25 sloping supply curve and winds up looking like an</p> <p>Page 96</p>

<p>1 X?</p> <p>2 A Yes. So to everybody, except to</p> <p>3 somebody taking an economics class, it just looks</p> <p>4 like an X, but there's some very important</p> <p>5 implications of that X.</p> <p>6 Q All right. And on a typical graph</p> <p>7 of a supply curve, what does a Y axis represent?</p> <p>8 A Well, you have the vertical axis and</p> <p>9 the horizontal axis. So on the vertical axis,</p> <p>10 which I'm taking to be your Y axis, would be the</p> <p>11 price -- the potential prices of the product. The</p> <p>12 horizontal axis would represent quantity supplied.</p> <p>13 Q When you talk about supply-side</p> <p>14 considerations, which comes up in your report, does</p> <p>15 the, quote, unquote, "willing seller" have to be</p> <p>16 the manufacturer of the good whose market value</p> <p>17 you're trying to determine?</p> <p>18 A The -- there's the ultimate supply</p> <p>19 curve and demand curves for the final product</p> <p>20 that's purchased by final consumers. And then if</p> <p>21 you think about it, there can be stages of</p> <p>22 production. So it's not uncommon that you have a</p> <p>23 manufacturer. You might even have a wholesaler or</p> <p>24 distributor. You might even have then the final</p> <p>25 retail outlet. So all of that goes into, you know,</p>	<p>Page 97</p> <p>1 things. Or it could be that the treadmills are</p> <p>2 actually, you know, contracted out, and so a</p> <p>3 company could buy, you know, a product and have it</p> <p>4 rebranded. So there's a lot of different things.</p> <p>5 But basically you'd kind of look at -- essentially</p> <p>6 you put a heavy weight on cost of production.</p> <p>7 Q How would you determine Sole's price</p> <p>8 elasticity of supply?</p> <p>9 A So there's -- just for the record,</p> <p>10 when you're talking about elasticities, or here</p> <p>11 you're talking about the price elasticity of</p> <p>12 supply, you're talking about the responsiveness or</p> <p>13 sensitivity of quantities supplied to a change in</p> <p>14 price. In other words, if price were to change --</p> <p>15 if you're talking about a market supply curve, the</p> <p>16 question would be if the price of the product were</p> <p>17 to change, how much would suppliers in aggregate</p> <p>18 respond? So let me say one more thing. When we</p> <p>19 talk about the concept of supply, that's kind of a</p> <p>20 qualitative concept. In other words, generally</p> <p>21 speaking, as the price goes up, the quantity supply</p> <p>22 increases. If the price decreases, the quantity</p> <p>23 supply decreases. Those are qualitative</p> <p>24 statements. When you talk about elasticity, then</p> <p>25 that starts to be quantitative. If price goes up,</p>
<p>Page 98</p> <p>1 kind of the final supply curve, but you can have</p> <p>2 stages of production. I'll stop there.</p> <p>3 Q In this case would the supply side</p> <p>4 consideration include Sole itself based on its</p> <p>5 internet sales as well as, let's say, Dick's?</p> <p>6 A Yeah, they're both competing for the</p> <p>7 final -- to the final consumer and --</p> <p>8 Q They both fall in that seller</p> <p>9 category?</p> <p>10 A I want to make sure I'm staying up</p> <p>11 with the question you're asking. But, yes, both</p> <p>12 Sole and Dick's sell to final consumers, yes.</p> <p>13 Q Have you done anything to determine</p> <p>14 the relevant supply curve at issue in this case?</p> <p>15 A I haven't estimated the supply</p> <p>16 curve, if that's what you're asking. No, I have</p> <p>17 not.</p> <p>18 Q How would you do it?</p> <p>19 A Well, I think the one thing you take</p> <p>20 into account when you're talking about supply,</p> <p>21 that's heavily dependent on cost of production.</p> <p>22 And so you look at, you know, raw material input</p> <p>23 costs or just, you know, if they acquire -- you</p> <p>24 know, what's the acquisition price of the motors</p> <p>25 that they put in the treadmills, those types of</p>	<p>Page 100</p> <p>1 how much does quantity supply increase? If price</p> <p>2 goes down, how much does quantity supply decrease?</p> <p>3 It gets a little bit more complicated 'cause you're</p> <p>4 talking about relative percentage changes within</p> <p>5 elasticity where you compare the percentage change</p> <p>6 in price to the percentage change in quantity</p> <p>7 supplied. But the elasticity is quantitative,</p> <p>8 supply is more qualitative is one way I think about</p> <p>9 it.</p> <p>10 Q And I'm not sure, but I thought my</p> <p>11 question was could you determine Sole's price</p> <p>12 elasticity of supply?</p> <p>13 A You -- at least maybe along a</p> <p>14 relative range, or you might figure out how they</p> <p>15 might respond in terms of production to a change in</p> <p>16 price or a change in input cost or those sort of</p> <p>17 things. So I'm not saying those are easy things to</p> <p>18 do, but that's how you would do it.</p> <p>19 Q And what --</p> <p>20 A And where -- I'm sorry. Where you'd</p> <p>21 start is, you know, I would start by looking at,</p> <p>22 you know, cost of production.</p> <p>23 Q And would that be the same for the</p> <p>24 price elasticity of supply of treadmills generally</p> <p>25 you look pretty much at the cost of production</p>

<p>1 predominantly?</p> <p>2 A Yeah, the -- this is again where it</p> <p>3 gets more complicated, and we could spend weeks on</p> <p>4 this. But, yeah, you'd look at the marginal cost</p> <p>5 of production, and the supply curve of the firm is</p> <p>6 the marginal cost of production above the average</p> <p>7 variable cost curve. And you sum those across</p> <p>8 firms to get the market supply curve. So it's very</p> <p>9 closely related to marginal cost of production,</p> <p>10 yes.</p> <p>11 Q Appreciate the shorter response. I</p> <p>12 don't have weeks.</p> <p>13 Do you have any idea what Sole's typical</p> <p>14 profit margin is on a treadmill?</p> <p>15 A No. No. All I know is that there</p> <p>16 was the discussion that their profit margins, you</p> <p>17 know, were being squeezed with the tariffs on the</p> <p>18 products from China. And their way to -- you know,</p> <p>19 to help with that phenomenon was to raise the</p> <p>20 prices by a hundred dollars, roughly speaking, of</p> <p>21 the treadmills.</p> <p>22 Q And we both I think used the term</p> <p>23 before "but-for world." And just to make sure, can</p> <p>24 you define that term as you understand it so we</p> <p>25 have a common understanding?</p>	<p>Page 101</p> <p>1 claims about the -- the horsepower claims on the</p> <p>2 motors. So I think that's a foundational point is</p> <p>3 what he's trying to do. So I do agree with the</p> <p>4 concept he's trying to look at the but-for world.</p> <p>5 So no arguments there.</p> <p>6 Q Would you agree that the damage</p> <p>7 analysis -- if you were going to do a classwide</p> <p>8 damage analysis in this case, it has to be or</p> <p>9 involve a but-for world?</p> <p>10 A I think so. I think I would agree</p> <p>11 with that. I was giving a long answer, so I agree</p> <p>12 he's looking at the but-for world. And as you</p> <p>13 know, I have a disagreement with him as to how he</p> <p>14 would implement that, so I just wanted to complete</p> <p>15 that part of the answer.</p> <p>16 Q Sure. What things would be</p> <p>17 different in the but-for world in this case as</p> <p>18 opposed to the real world? I know, obviously, one</p> <p>19 difference would be the change in the horsepower</p> <p>20 claim, but is there anything else that would be</p> <p>21 different?</p> <p>22 A Well, I think my understanding is</p> <p>23 that plaintiffs are making certain allegations</p> <p>24 about representations dealing with horsepower. And</p> <p>25 if we can just broadly stay with that. Plaintiffs</p>
<p>Page 102</p> <p>1 A Sure. So when we talk about</p> <p>2 "but-for" -- and I'll give a couple of different</p> <p>3 explanations so we can converge. But the but-for</p> <p>4 world -- this is going to sound strange to somebody</p> <p>5 that's not in litigation, but the but-for world is</p> <p>6 a world that didn't exist. The but-for world is</p> <p>7 usually described as what the world would look like</p> <p>8 in the absence of the alleged wrongful conduct. Or</p> <p>9 the but-for -- sometimes you talk about a but-for</p> <p>10 reconstruction. In other words, for example, what</p> <p>11 would the market look like with this one change.</p> <p>12 But generally in an environment that we're talking</p> <p>13 about, it has to do with what would the world have</p> <p>14 looked like in the absence of the alleged wrongful</p> <p>15 conduct.</p> <p>16 Q And I understand that you may take</p> <p>17 issue with his methods, but do you believe that Mr.</p> <p>18 Gaskins' proposed methodology is an attempt by him</p> <p>19 to measure the change in market value of the</p> <p>20 challenged products in a but-for world?</p> <p>21 A Well, let's take it in baby steps if</p> <p>22 we can. I don't disagree with he's contemplating a</p> <p>23 but-for world. In other words, he's saying if we</p> <p>24 take the actual world and we make this one change,</p> <p>25 and that change has to do with -- I understand the</p>	<p>Page 104</p> <p>1 are also claiming a price premium damages approach.</p> <p>2 My understanding of plaintiffs' theory would be</p> <p>3 that if allegedly accurate information had been</p> <p>4 presented to consumers as opposed to the actual</p> <p>5 challenged claim, that consumers would have paid</p> <p>6 less. So if you're trying to isolate that, I think</p> <p>7 your question was what else would be different in</p> <p>8 the but-for world. But given my understanding of</p> <p>9 what's being claimed as damages -- and I'm not an</p> <p>10 attorney, but given my understanding of how the law</p> <p>11 might want -- allow one to get to price premium</p> <p>12 damages, I think that would be the only change to</p> <p>13 try to isolate what that alleged price premium</p> <p>14 would be. Hopefully I answered the question, but</p> <p>15 that's my understanding. So it should have been a</p> <p>16 short, yes, that the change is the information</p> <p>17 provided about the attributed dispute.</p> <p>18 Q And so the attributed dispute being</p> <p>19 horsepower, and in the but-for world the price</p> <p>20 might change as well?</p> <p>21 A Well, that would be something that</p> <p>22 would have to be analyzed, and so here's where you</p> <p>23 have to be careful. There's a couple of different</p> <p>24 ways to look at this. One is to realize that the</p> <p>25 description of the attribute might be different,</p>

<p>Page 105</p> <p>1 but it's actually holding the product the same. In 2 other words, the product's the same. It's just the 3 description of whatever the dispute is here about 4 how horsepower information is communicated. So 5 that's the only difference. Now, where you have to 6 be very, very careful -- and I don't think anybody 7 wants to go in this direction -- but if price were 8 to go down, it could be that there's incentives to 9 make other changes to the treadmills. But that 10 becomes much more complicated, but we're not going 11 in that direction. So I think what I would say is 12 you got the exact same treadmill. Description's a 13 little bit different. And then the area of inquiry 14 is does the price change at all. But that becomes 15 an empirical question. You asked me what changed. 16 For me it's just the information flow. And then 17 it's an empirical question as to whether the price 18 will change.</p> <p>19 Q So in the but-for world, would you 20 not be looking at whether features change or the 21 defendant sells fewer treadmills or whether it 22 repurposes its facilities to make different 23 treadmills? None of that you would be looking at 24 in the but-for world if you were analyzing it in 25 this case?</p>	<p>Page 107</p> <p>1 description? Assume it's the same product. The 2 description varies. But you're holding constant 3 the number of treadmills they manufacture, you 4 know, whether they add more features or change 5 their advertising. All that is being held 6 constant, and you're just changing the description; 7 is that correct?</p> <p>8 A No, I -- no. Because there's kind of 9 first order and second order things. So if it 10 turns out that because the performance of the 11 treadmill and the quality of the treadmill is the 12 same, you know, whether you describe the horsepower 13 as A versus B may not affect the demand curve since 14 the flow of services are the same. If that doesn't 15 affect the demand curve, and if there's no change 16 in the supply curve, then the price hasn't changed, 17 and the quantity hasn't changed. But if the demand 18 curve were to change, if the demand curve were to 19 decrease or shift down, then the price would 20 decrease, and there would be -- in a new market 21 equilibrium there would have been a different price 22 and quantity. That doesn't mean you still can't do 23 what you can do, but I'm not -- I want to be 24 careful that, you know, we just described the 25 mechanism a little bit more precisely than the way</p>
<p>Page 106</p> <p>1 A I mean, that could -- that could 2 happen. It would make the analysis very, very 3 complicated. That's what I tried to say. I mean, 4 if you really think about it, you know, very rarely 5 do companies just sort of change along one 6 dimension. They may change along a number of 7 different dimensions. But I think the exercise 8 here would try to keep things as constant as 9 possible, except for the information flow revolving 10 around the description of the horsepower of the 11 motor and how that's described to the consumer. 12 But other than what impact they may have, my first 13 inclination would be to say, hey, in this 14 description of the but-for world the product's the 15 same, and people are getting the same flow of 16 benefits. This has to be -- this is why you have 17 to make sure that the analysis is correct. It's 18 not like the quality of the product is changing. 19 It's not like the performance of the product is 20 changing. The product is identical. It's just 21 that there's a description of what feature that's 22 different.</p> <p>23 Q So for analysis of the but-for world 24 in this case in terms of damages, would you say 25 that you would hold constant everything except the</p>	<p>Page 108</p> <p>1 you were phrasing it.</p> <p>2 Q Have you ever seen a American 3 business draw its own supply curve before making a 4 decision to produce a product?</p> <p>5 A I think they do that every day of 6 their lives. The interesting thing about economics 7 -- and this is the hard part to understand - is 8 that we can be talking theory, and I can go in to 9 teach a class and talk about all different theories 10 like a consumer -- you know, when you talk about 11 the theory of consumer, you talk about maximizing 12 utilities subject to your budget constraint. Well, 13 I may think that way when I go into a grocery store 14 and I buy something, okay, this will up my utility, 15 because I'm an economist. But consumers don't 16 necessarily know all the theory, but they behave as 17 if they know those theories. In other words, you 18 buy products that give you the most satisfaction. 19 You don't walk around saying, "Hey, I maximized my 20 utility today." But, hopefully, when you spend 21 your income, you were getting the greatest 22 satisfaction out of that. It's the same thing with 23 firms. They may not draw the supply curve, but 24 they clearly -- I mean, this is what the whole 25 financial statements are about. They look at their</p>

<p>1 costs of production. They look at their revenues. 2 They look at prices that can be charged. So they 3 may not put it in the classroom setting of supply 4 and demand curves and elasticities and everything 5 else, but they behave as if they're doing those 6 concepts. So I would say companies look at those 7 concepts all the time. 8 Q For the purposes of calculating 9 damages in this case, would you agree that the 10 number of challenged treadmills purchased by the 11 proposed class members is fixed as a matter of 12 history? 13 A I would say that -- I would say you 14 have to be very careful with that statement. The 15 number of treadmills that were transacted in the 16 marketplace is a known quantity. I'm not 17 disagreeing with that. I think that there's some 18 plaintiff experts that take that to the extreme and 19 draw some incorrect conclusions. Nobody is saying 20 that that number is different, that the number of 21 actual treadmills sold is somehow different than 22 was actually sold. That does not mean, however, 23 that every one of those represents a damaged 24 purchase. 25 Q Do you think that the supply -- if</p>	<p>Page 109</p> <p>1 that? 2 A Well, that's -- that's where just 3 like, you know, there's techniques -- you know, 4 even the conjoint analysis to try to figure out the 5 demand side of the market. You can look at and 6 take into account cost of production to try to 7 figure out how firms might respond to a change in 8 price. 9 Q And then you mentioned cost of 10 production. Anything else to determine the supply 11 curve? 12 A Well, you generally take into 13 account -- cost of production is the easy one. But 14 also, you know, opportunity cost and other 15 alternatives. In other words, sometimes companies 16 will not only look at the costs of making a 17 particular product, but you've always got to keep 18 an eye on, well, if I took my resources and put 19 them into something else, what could I make 20 somewhere else? Companies do that. That's when 21 they go out of business and they take their 22 resources and make a different product. So you've 23 got to, you know, look at your opportunity costs 24 and your costs of production. And the technology 25 tells you how you combine inputs to produce output,</p> <p>Page 111</p>
<p>1 you were going to figure out the supply for the 2 purposes of determining damages in this case, as 3 you indicated you have to consider supply-side 4 considerations, would that be anything other than 5 the historical number of units sold in your view? 6 A Yes, because when you talk about 7 supply, you talk about all the different prices and 8 all the different quantities supplied along a 9 supply curve. You're not just talking about one 10 point. There can be one point on a supply curve 11 where you have a given price and the corresponding 12 quantity supplied, but that's not what supply is. 13 Supply is all the different prices and all the 14 different quantities supplied that make your supply 15 relationship between price and quantity supplied. 16 That's what we're talking about when we talk about 17 the concept of supply. So there's a supply curve 18 that tells you that relationship, and then when you 19 interact demand with supply that tells you where 20 you are along that supply curve. 21 Q Have you calculated the supply curve 22 for the challenged treadmills in the but-for world 23 here? 24 A No. 25 Q And how would you go about doing</p> <p>Page 110</p>	<p>1 but all of that goes into the supply side. 2 Q And what econometric tools, if any, 3 would you use to determine the supply curve? 4 A You could try to figure out 5 elasticities of supply. So for small movements in 6 price, how might quantity supply change? So you 7 could look at that. Or, you know, you -- like I 8 said, you could see how your costs change as output 9 changes. That's -- when I was talking about 10 marginal costs before, that's what that concept is. 11 So if there's a change in price and if you were to 12 change output, you know, how would your costs 13 change relative to the change in revenue? And when 14 you look at a change in revenue relative to change 15 in costs, you know, what does it make sense to do 16 in terms of production? That's what companies, you 17 know, try to figure out. 18 Q In your review of this case, have 19 you spoken to any consumers? 20 A I have not spoken to consumers. I 21 have done a lot of looking at reviews, you know, 22 star ratings and so forth, but I haven't spoken to 23 any consumers. 24 Q And let me give you a hypothetical. 25 You've got -- suppose you got 50,000 class</p> <p>Page 112</p>

<p>1 treadmills, and let's suppose you're to do a supply 2 analysis and you determine to your satisfaction 3 that only 40,000 class treadmills would have been 4 supplied if Sole had disclosed the true horsepower 5 of those treadmills. What would be the appropriate 6 measure of economic loss for those 10,000 7 treadmills that would not have been sold?</p> <p>8 A Yeah, there's two ways to do it. 9 One is that the value of any product to an 10 economist is its market price. So you'd have a new 11 equilibrium market price, and so you could still 12 look at a price difference between what they paid 13 and what the price would have been in the absence 14 of the alleged misrepresentation. So you can still 15 take that price delta. What the damages is not, it 16 is not equal to the entire amount that they paid 17 for the treadmill. Because even though they may 18 not have bought it, they still got the flow of 19 services from the treadmill. So you can't just 20 say, oh, for all those other people we'll just take 21 the amount that they paid for the product because 22 they still got -- they still got the product, and 23 they still got the flow of services from the 24 product.</p> <p>25 Q You talked about some supply-side</p>	<p>Page 113</p> <p>1 A Yeah. 2 Q As a matter of economics, do you 3 believe there's ever an occasion where a conjoint 4 analysis can be used to determine classwide 5 economic damages? 6 A If you -- I think of it as a 7 spectrum and where the needle is on the spectrum; 8 and the more narrow some of the attributes of the 9 product, and the more narrow some of the 10 perceptions about the product, the greater the 11 probability that a conjoint analysis properly 12 modified can give guidance to an answer. But the 13 greater the dispersions you see, whether it's the 14 price variability or interpretation of the alleged 15 claim asserted, alleged misrepresented claim, then 16 it becomes harder for conjoint analysis to work. 17 But I will stick by the original position that 18 there needs to be modifications to the conjoint 19 analysis 'cause the conjoint analysis really is 20 just telling you about the demand side of the 21 market. It's not saying anything about the supply 22 side of the market. Even though I gave you this 23 description of the distribution around the 24 perceptions of the product and the interpretations, 25 even holding that constant, you've still got the</p>
<p>1 considerations. Would the disclosure of the true 2 horsepower in a but-for world affect the cost of 3 production?</p> <p>4 A To me that's a technical question. 5 My first response -- if you were to just say, "You 6 have zero information, tell me your best guess, and 7 then you can run off and study it," my first guess 8 would be, no, I don't think so because everything's 9 the same. You might have a labeling change, but 10 that's kind of a wash with the original labeling. 11 So my first inclination is to say, no, you know, 12 subject to analysis.</p> <p>13 Q Would the disclosure of the true 14 horsepower affect things like the cost of labor, 15 the cost of shipping? 16 A I don't believe that there would be 17 a corresponding spillover effect to other input 18 costs unless -- you know, the only thing I'm going 19 to say is I'm not the mechanic. I'm not the 20 engineer. I don't know what spillover effects may 21 exist. But just at the first, you know, 22 inclination I'm giving you the answers that I can 23 give you. When I start to feel uncomfortable, I'll 24 let you know.</p> <p>25 Q And you have. That's fine.</p>	<p>Page 114</p> <p>1 problem that the conjoint analysis is a demand-side 2 analysis. It's not a market equilibrium price 3 analysis.</p> <p>4 Q Would you agree that you're not an 5 expert in conjoint analysis? 6 A Yeah, I've always said I'm not your 7 survey person. So what -- I mean, I've done, you 8 know, 50 of these cases. I evaluate from an 9 economic and damage quantification perspective. A 10 conjoint analysis in terms of the inputs and the 11 outputs and the implications for damages, that I 12 absolutely am an expert in doing, and I've done it 13 on virtually every case. But I'm not what I would 14 call a survey expert in the sense that if you came 15 to me and said, "Hey, Doctor, I need a survey 16 done," well, I've got colleagues that specialize in 17 that area, and I direct you to them. But in terms 18 of what I'm doing in terms of economics and damages 19 and the application of the results of conjoint 20 analysis to that environment, absolutely, I'm an 21 expert.</p> <p>22 Q Have you designed and conducted 23 market research studies? 24 A I haven't -- that's what I'm saying. 25 So I'm not the survey person, but I'm an economist,</p> <p>Page 116</p>

<p>Page 117</p> <p>1 and I'm well versed in the theory of -- like the 2 theory of consumer behavior. And if there's one 3 thing an economist knows, that's demand for a 4 product and the inputs that go into a demand for a 5 product and why people buy products and studying 6 the determinants of demand. So those are all areas 7 that are within my expertise, but I don't take that 8 next step and design a survey. That's what I'm 9 saying. I'd send you to my colleague for designing 10 a survey, but I clearly give inputs into here's 11 what you better look at when you're designing that 12 survey.</p> <p>13 Q But you've never designed yourself a 14 conjoint survey?</p> <p>15 A Not myself for all the reasons that 16 I've just said.</p> <p>17 Q Have you ever implemented or 18 executed a conjoint survey that someone else has 19 designed?</p> <p>20 A Same answer.</p> <p>21 Q It would be no?</p> <p>22 A Yeah, but for all the reasons. I 23 mean, my area of specialization is a little 24 different. I don't do the actual survey, but I 25 look at it from an economic perspective. I know</p>	<p>Page 119</p> <p>1 Q Not even on an annual basis? Even a 2 decades basis? Any basis?</p> <p>3 A Yeah, there's been times that I've 4 rerun, you know, the models that have been put 5 forth in cases. So I have done that.</p> <p>6 Q So you've rerun somebody else's 7 regression. Have you run any hierarchial Bayes 8 regressions that you've designed yourself?</p> <p>9 A Yeah, not for all the reasons that 10 I've said before. You know, I look at it from an 11 economic perspective. And I might be so bold as to 12 say, some of the other people they say that and 13 throw around some fancy terms, but they're letting 14 the program do the running. They're not actually 15 designing these and running them. They're not -- 16 no matter what they try to do and put fancy words 17 in the report, they're not really doing that. 18 They're letting the program do it.</p> <p>19 Q So I shouldn't pay them as much as 20 I'm paying them? Is that what you're saying?</p> <p>21 A Well, I'll let you decide that.</p> <p>22 Q Have you conducted yourself any 23 conjoint-based market simulations?</p> <p>24 A No. I mean, all the answers are the 25 same that I've given you in terms of what I do. So</p>
<p>Page 118</p> <p>1 the determinants of demand. I know when you've 2 missed the mark in your survey. So I'm not going 3 to go out and write the question. I'm not going to 4 go up to you and ask you the question, but I'm 5 going to tell you, "Hey, your question's missing 6 all these determinants of demand." Or if you get 7 an answer, I'm going to tell you why that's not a 8 price. That's only a willingness to pay.</p> <p>9 Q And I'll help Susan with this later. 10 Have you run a hierarchial Bayes regression?</p> <p>11 A Yeah, the -- just in the sense of 12 reviewing, you know, what other people have done. 13 I understand that's one of the techniques -- that's 14 one of the procedures that's used to take into 15 account the full information from the survey 16 results, but, you know, I don't do that in a survey 17 technique because I'm not doing a survey.</p> <p>18 Q And other than in a survey 19 technique, have you ever run a hierarchial Bayes 20 regression?</p> <p>21 A You know, I might have done some 22 two-stage type regressions which get to be kind of 23 a close cousin. But, you know, I don't run around 24 on a daily basis saying, "Okay, let me run a 25 hierarchial Bayesian regression today."</p>	<p>Page 120</p> <p>1 I approach things and I'm retained as a forensic 2 economist and damage quantifier. So I'm not -- I'm 3 not critiquing, you know, the pure survey aspects, 4 nor do I run those surveys. But I absolutely can 5 look at things like prices, determinants of demand 6 and either the inputs or the outputs. I just don't 7 get into the, you know, mechanics of actually doing 8 the survey.</p> <p>9 Q And in this case you're critiquing 10 in part a proposed contract market simulation; 11 correct?</p> <p>12 A Sure. Yes. For all the reasons 13 that I've just said.</p> <p>14 Q And in approximately how many cases 15 have you done that?</p> <p>16 A Probably -- you know, I would say 17 out of the 40 or 50 cases I've worked on, I've got 18 to say at least three-quarters of them probably had 19 a conjoint analysis where I've done this exact same 20 analysis. So I'm sure 40 different times I've 21 looked at that to the extent -- now, I don't mean 22 to take up your time. But, you know, earlier we 23 talked about the different cases. Sometimes people 24 propose an analysis. Sometimes they do the 25 analysis. Sometimes they sort of just say, "I can</p>

<p>1 do it," without really proposing even an analysis.</p> <p>2 But it's not infrequent, if that makes sense, that</p> <p>3 I see a conjoint analysis and evaluate it the same</p> <p>4 way that I'm doing here.</p> <p>5 Q Have you taken any courses with</p> <p>6 respect to conjoint analysis?</p> <p>7 A I've actually, you know, read books.</p> <p>8 I've read what other experts. I've listened to</p> <p>9 deposition transcripts. I've listened to marketing</p> <p>10 professors. I've worked on the same side as</p> <p>11 marketing professors. So the knowledge I've</p> <p>12 obtained has come through, you know, all of that</p> <p>13 work experience. So sometimes I may just do one</p> <p>14 side of a case, and there may be a marketing</p> <p>15 professor on the same side of the case as well. So</p> <p>16 I've had those interactions. And like I've said,</p> <p>17 I've read, you know, some of the literature and</p> <p>18 also listened to what, you know, opposing experts</p> <p>19 have said. So I've actually got a wealth of input</p> <p>20 into, you know, what I know about it.</p> <p>21 Q Have you taken any courses with</p> <p>22 respect to conjoint analysis?</p> <p>23 A Not any particular courses, no.</p> <p>24 Q Have you published any articles with</p> <p>25 respect to conjoint analysis?</p>	<p>Page 121</p> <p>1 Q How was it counter?</p> <p>2 A Well, he keeps saying that he's</p> <p>3 calculating the market price, or at least that's</p> <p>4 the inference, the change in price, when the</p> <p>5 literature doesn't support that. And the documents</p> <p>6 that he's relying upon don't say that. They talk</p> <p>7 about it -- you know, a willingness to pay. They</p> <p>8 talk about it being the demand side. They're</p> <p>9 saying you have to be careful because it doesn't</p> <p>10 take into account the supply side. All of those</p> <p>11 things are in the documents that he's relying upon,</p> <p>12 and which I've cited in my report.</p> <p>13 Q And, in particular, what documents</p> <p>14 are you relying upon or are you saying that he's</p> <p>15 relying upon?</p> <p>16 A Well, I think he's got some</p> <p>17 references to some Sawtooth software descriptions</p> <p>18 and so forth. So Sawtooth-related or Orme-related.</p> <p>19 That's an author.</p> <p>20 Q Would you be able to conduct and</p> <p>21 perform the conjoint analysis proposed by Mr.</p> <p>22 Gaskin?</p> <p>23 A I think I would, but, frankly,</p> <p>24 that's where I would turn it over to a colleague.</p> <p>25 If I was asked to do it, I think I could do it, but</p>
<p>Page 122</p> <p>1 A No. And, frankly, probably in the</p> <p>2 last ten years I haven't published any articles at</p> <p>3 all. So even though I've been doing damage</p> <p>4 quantification for 35 years, I don't -- that's not</p> <p>5 what my job is. I don't publish articles.</p> <p>6 Q And you mentioned that there are</p> <p>7 individuals in the analysis group who do have</p> <p>8 expertise in designing and implementing conjoint</p> <p>9 analysis?</p> <p>10 A Yes.</p> <p>11 Q Did you consult with any of those</p> <p>12 colleagues regarding the proposed conjoint analysis</p> <p>13 in this case?</p> <p>14 A Not in this case. In other cases I</p> <p>15 have. So I have relied on input from my colleagues</p> <p>16 in other cases, but in this case it wasn't</p> <p>17 necessary because this was pretty much a -- you</p> <p>18 know, a standard type description of what was being</p> <p>19 described. There wasn't any special aspects that</p> <p>20 required me to consult with a colleague. 'Cause I</p> <p>21 also even just looked at the reference materials</p> <p>22 that Mr. Gaskin was relying upon, and it supported,</p> <p>23 A, what I knew, and, B, you know, what my position</p> <p>24 was here, and actually was counter to what he was</p> <p>25 saying. So I did all of those things.</p>	<p>Page 124</p> <p>1 I wouldn't do it. I'd turn it over to a colleague.</p> <p>2 Q You would turn it over to a</p> <p>3 colleague who had expertise in conjoint?</p> <p>4 A No, not expertise in conjoint. In</p> <p>5 actually performing it, the mechanics of it. That</p> <p>6 doesn't mean I'd abdicate the -- you know, the</p> <p>7 inputs or the output, what it's telling you, what</p> <p>8 determinants of demand are. All of the things that</p> <p>9 I'm critiquing on Mr. Gaskin, I would still feel</p> <p>10 that I could comment on and provide guidance to my</p> <p>11 colleague. But the actual running of the survey</p> <p>12 and running of the software, I would have my</p> <p>13 colleague do that.</p> <p>14 Q And the design of a survey, if it</p> <p>15 needed it to be done, you would have a colleague do</p> <p>16 that as well?</p> <p>17 A I want to be careful here, you know,</p> <p>18 because we're using very broad terms. When you say</p> <p>19 "design," you mean picking attributes, or do you</p> <p>20 mean, you know, do I survey a thousand people, do I</p> <p>21 use an internet survey, do I use a mall survey? I</p> <p>22 mean, all of those issues I would probably leave up</p> <p>23 to my colleague. But things like attributes,</p> <p>24 attribute levels, competing products, things like</p> <p>25 that I would definitely have input to just like I'm</p>

<p>1 evaluating here. You know, what are the important 2 determinants of demand? Can you, you know, really 3 measure what Mr. Gaskin's doing without ever 4 mentioning that these are highly rated award- 5 winning products and not even having that piece of 6 information for the consumer, but still trying to 7 figure out how one change might affect, you know, 8 the price or the willingness to pay for a product? 9 Those are all things that squarely fit in with my 10 skills, knowledge, education, experience and 11 training. 12 I think we've -- if it's a good breaking 13 point, it's been about an hour, but whatever is 14 convenient for you. 15 Q No, that's fine. Let's do it. 16 Lunch half an hour enough time for everybody? 17 A I think that will work for me, yeah. 18 Q All right. 1:45? 19 A If it works for the court reporter. 20 THE COURT REPORTER: I'm fine. Thank 21 you. 22 Q All right, 1:45. We'll see you back. 23 Thanks. 24 (Whereupon, the deposition was recessed 25 for lunch at 1:15 o'clock p.m. and reconvened at</p>	Page 125	<p>1 A 'Cause there hasn't been -- there 2 hasn't been anything done by Mr. Gaskin. 3 Q Right. Are there any objective 4 measures of the accuracy of a conjoint analysis? 5 A Objective measures of the accuracy 6 of a conjoint analysis. Well, I mean, you can do 7 some of the things that I'm, you know, talking 8 about in terms of, you know, measuring the accuracy 9 of the inputs or measuring the accuracy of the 10 outputs. In other words, if you're not getting the 11 proper determinants of demand for a product, you 12 know, that will make the conclusions that are drawn 13 to be suspect and may not be usable. You know, I 14 think -- 15 Q Well, you're -- you're talking -- 16 sorry to interrupt. But as I understood it, your 17 critiques with regard to inputs and outputs is one 18 might say subjective rather than objective for the 19 most part. Do you know whether there are any 20 objective measures to determine the accuracy of a 21 conjoint analysis? 22 A Yeah, I mean, I'll disagree with the 23 subjective/objective. I mean, they go to basic 24 economic theory. But with respect to measuring the 25 -- you mean if -- I guess maybe I didn't understand</p>	Page 127
<p>1 1:47 o'clock p.m.) 2 BY MR. MARKOVITS (Continuing): 3 Q Doctor, do you have a license for 4 Sawtooth software? 5 A I don't know if -- I do not. I 6 don't know if the firm does. 7 Q Do you know -- do you have a license 8 for any Sawtooth product or conjoint analysis 9 product? 10 A Not me, no, but I can't speak for 11 the firm. 12 Q Are there -- have you used -- you 13 personally used the software, the Sawtooth 14 software? 15 A I have -- I believe I think on other 16 cases I've had -- I've had people do some 17 sensitivities on the analyses that have been 18 presented by others. So either on that or a very 19 close cousin, but I've had other people under my 20 direction do some of that type of work on other 21 cases. 22 Q You haven't done anything with 23 regard to Sawtooth software in this case; correct? 24 A That's correct. That's correct. 25 Q Are there any --</p>	Page 126	<p>1 your question. If somebody were to actually 2 perform the conjoint analysis and the corresponding 3 market simulations, are you saying how would you 4 test whether they are right or not? 5 Q Yes. 6 A Is that what you're asking? 7 Q That is what I'm asking. 8 A Well, I think, you know, an easy way 9 to do it is if you have an issue with some of the 10 inputs, you know, just re-perform the analysis with 11 the proper inputs and see what kind of change you 12 get. 13 Q Apart from -- can you test the 14 accuracy of an analysis performed with the inputs 15 that Mr. Gaskins wants to use? So he does his 16 proposed conjoint analysis using the inputs he 17 proposes. Are there objective measures that can be 18 taken to test the accuracy of his determinations? 19 A In general about conjoint or on this 20 particular issue? Because one could -- one could 21 use conjoint analysis on an attribute of a 22 treadmill that we know changed and see what the 23 conjoint analysis gives you versus what happened in 24 the real world and to see if it's close or not. So 25 that would be a proxy approach. And if it doesn't</p>	Page 128

<p>Page 129</p> <p>1 perform well on changes in attributes that we know</p> <p>2 actually happened where we saw results, that would</p> <p>3 call into question the use of the conjoint analysis</p> <p>4 for a different attribute on the same machine.</p> <p>5 Q Let's suppose Mr. Gaskin does his</p> <p>6 conjoint analysis here. Is there anything -- any</p> <p>7 test that you can run to your knowledge to test the</p> <p>8 accuracy of his determinations?</p> <p>9 A Well, I know one can kind of look at</p> <p>10 the underlying data. So one could just look at the</p> <p>11 underlying data to see if the results are making</p> <p>12 sense. And other times when you look at the</p> <p>13 underlying data you can see some of the results</p> <p>14 that aren't making sense in terms of, you know, the</p> <p>15 magnitude of the underlying numbers that are coming</p> <p>16 out of the survey or the range or whether they're</p> <p>17 positive or negative. So you can look at some of</p> <p>18 those next-layer-down results to see that when you</p> <p>19 get the final -- you know, the final determination</p> <p>20 whether that's making sense or it's just an average</p> <p>21 that it's kind of, you know, washing all of those</p> <p>22 issues aside. That's one thing you can do. You</p> <p>23 could do, you know, subsets of it. You could run</p> <p>24 other experiments. You could do all of those</p> <p>25 things that I'm saying.</p>	<p>Page 131</p> <p>1 Q How is mean absolute ever used by</p> <p>2 conjoint practitioners?</p> <p>3 A You know, my -- I would say that</p> <p>4 they would probably look at dispersions and see how</p> <p>5 wide the dispersions are. Just kind of what I</p> <p>6 talked about previously about, you know, the range.</p> <p>7 I wasn't using statistical language, but I was</p> <p>8 trying to just talk about some of the ranges you</p> <p>9 might get.</p> <p>10 Q Do conjoint analysis need to involve</p> <p>11 every attribute of the product being studied?</p> <p>12 A I don't believe that it's generally</p> <p>13 accepted that every attribute has to be included,</p> <p>14 but I think important attributes to the</p> <p>15 decision-making process that help with the</p> <p>16 mimicking of the actual purchase behavior of, you</p> <p>17 know, customers or respondents is a guiding</p> <p>18 principle.</p> <p>19 Q And what do you base that on?</p> <p>20 A My skills, knowledge, education,</p> <p>21 experience and training as an economist. Plus, you</p> <p>22 know, my understanding of what I've seen in some of</p> <p>23 the literature for conducting these types of</p> <p>24 surveys.</p> <p>25 Q And can you point me to any</p>
<p>Page 130</p> <p>1 Q Have you ever heard of the term</p> <p>2 "root likelihood" in conjunction with conjoint</p> <p>3 analysis?</p> <p>4 A Yeah, I mean, it's just -- yes. I</p> <p>5 mean, I think it's a statistical -- you know, a</p> <p>6 statistical measure that you might look at.</p> <p>7 Q What's your understanding of it</p> <p>8 beyond that it's a statistical measure?</p> <p>9 A Yeah, I don't know that I can give</p> <p>10 you a formal definition as I sit here right now.</p> <p>11 Q Are you familiar with the concept of</p> <p>12 holdout performance with respect to conjoint</p> <p>13 analysis?</p> <p>14 A Yeah. And, in fact, that's what I</p> <p>15 described to you on one of those was working on a</p> <p>16 subset in trying to make a prediction with respect</p> <p>17 to the remainder. So I already described that.</p> <p>18 Q And are you familiar with the</p> <p>19 concept of mean absolute error?</p> <p>20 A Yes. It's another statistical</p> <p>21 measure you're looking at. I mean, basically this</p> <p>22 all goes to statistics in terms of means, variances</p> <p>23 and dispersions and seeing how, you know, wide</p> <p>24 variances you get and things like that in the</p> <p>25 results.</p>	<p>Page 132</p> <p>1 literature which would suggest that important</p> <p>2 attributes have to be part of a conjoint analysis?</p> <p>3 A I think all of the literature would</p> <p>4 say that. I mean, you can look at all the -- look</p> <p>5 at all the citations that I have in my report,</p> <p>6 especially the Sawtooth documents themselves.</p> <p>7 Q All right. So you believe the</p> <p>8 Sawtooth documents, the Orme document would</p> <p>9 indicate that if you're running a conjoint analysis</p> <p>10 all important attributes have to be part of that</p> <p>11 analysis?</p> <p>12 A Yeah, I think they might talk about</p> <p>13 a tradeoff that you don't want to have so many that</p> <p>14 are overwhelming for the survey participant, but I</p> <p>15 think you need to have the important determinants</p> <p>16 of the purchase behavior so you don't -- so you</p> <p>17 accurately in a sense get an indicator of the value</p> <p>18 of various components of the product in question.</p> <p>19 Q Can a conjoint be used to study</p> <p>20 products that have not yet been introduced in the</p> <p>21 market?</p> <p>22 A I think that's -- that can be done,</p> <p>23 sure.</p> <p>24 Q Can a conjoint be used to study</p> <p>25 attributes of products that are not yet in the</p>

<p>1 market -- the attributes are not yet in the market? 2 The product may be. 3 A Yeah, I think that's -- a lot of 4 times that's what it's used for. Gives you an 5 indication of perhaps the demand for the product. 6 But then, you know, the whole point is you look at 7 that demand, you know, relative to the costs of 8 production before you ultimately make a 9 determination. So, again, what you're saying is 10 it's a demand-side consideration unless modified, 11 as I said, which is the whole point I'm making in 12 my report. 13 Q And you can include an attribute in 14 a conjoint analysis that's a new attribute, whether 15 it's important or not important; correct? 16 A You could, sure. 17 Q What is orthogonal design within the 18 context of a choice-based conjoint? 19 A Yeah, I think that -- you know, 20 that's a survey type word, but the whole idea of 21 the orthogonal design is -- I think basically it 22 just helps out to make sure that you're not 23 getting, you know, answers that don't make sense. 24 You're not getting biased answers, that some of 25 the question are independent and so forth. I think</p>	<p>Page 133</p> <p>1 technical person, but they boil down to the output 2 of the motor of the treadmill and whether you're 3 getting the, you know, sort of effective horsepower 4 or not or whether it's continuous horsepower as 5 opposed to not. 6 Q Is it your understanding that 7 plaintiffs are alleging that the treadmills are 8 defective? 9 A I don't -- I had never thought of it 10 that way. I just thought of it as dealing with 11 more of a description of the motor itself and the 12 output of it and how it works as opposed to any 13 defect. I've never taken it as a defect type case. 14 Q You've taken it as a mislabeling 15 type case? 16 A I think that would be a shorthand 17 way of saying it, sure. 18 Q And for the purposes of damages 19 analysis, would it be appropriate for an expert 20 such as yourself or the plaintiffs' experts to 21 assume liability? 22 A You know, we talked about this 23 before. In damages you can assume liability, 24 although it depends on the nature of the 25 presentation that one is making to the trier of</p>
<p>Page 134</p> <p>1 at a very high level that's how I might describe 2 it. 3 Q And is orthogonal design recommended 4 for choice-based conjoint? 5 A Yes. 6 (Whereupon, the court reporter asked for 7 clarification.) 8 Q Is orthogonal design recommended for 9 choice-based conjoint? 10 A The answer is yes. I had said yes, 11 then he repeated the question. But the yes still 12 applies. 13 Q Dr. Ugone, have you reviewed the 14 complaint in this case? 15 A Yes, I have. 16 Q Are you generally familiar with it? 17 A Yes. 18 Q And in your own words, can you tell 19 me what you understand plaintiffs' theory of 20 liability to be? 21 A I might put it -- well, I think a 22 shorthand way I think about it is allegedly 23 inflated horsepower claims. And I think there can 24 be -- I think it can fall into two buckets, but 25 basically they all boil down to -- I'm not a</p>	<p>Page 136</p> <p>1 fact. But a lot of times if you're talking about 2 damages, you are making assumption that liability 3 is found or you don't get to the damages question 4 at all. And that's often explained, you know, to 5 the jury or to the trier of fact. Here it's a 6 little murky because, you know, at the class 7 certification stage in many respects you're trying 8 to figure out does a change in an attribute cause a 9 change in a price, which, frankly, could be 10 independent of a damages question. You're just 11 trying to see whether a change in an attribute 12 causes a price. That's why I don't think you have 13 to say you're making an assumption as to damages or 14 liability. 15 Q Do you agree that a historic market 16 price reflects the then extant demand conditions? 17 A A market price is determined by the 18 interaction of supply and demand. So there is a 19 demand side to a market price. It's an equilibrium 20 price. It's generally, unless there's other 21 constraints, a market clearing price. 22 Q And part of that is demand, so that 23 historic market price would reflect the then extant 24 demand conditions; correct? 25 A Yeah, I want to make sure I</p>

<p>1 understand your question.</p> <p>2 Q Wouldn't necessarily give you the</p> <p>3 demand curve, but the then extant market price</p> <p>4 would reflect the demand conditions at that time in</p> <p>5 history?</p> <p>6 A Embedded in the determination of</p> <p>7 that price would be, in part, demand conditions, if</p> <p>8 that's what you're asking.</p> <p>9 Q And embedded in the historic market</p> <p>10 price would also be a supply condition; correct?</p> <p>11 A Well, it's the interaction of supply</p> <p>12 and demand that determine market price. So it's a</p> <p>13 market equilibrium price, and you only get a price</p> <p>14 when you have supply and demand interacting</p> <p>15 together in a competitive market.</p> <p>16 Q So the answer would be, yes, the</p> <p>17 historic market price reflects, in part, the then</p> <p>18 extant supply condition?</p> <p>19 A So you would have the price taking</p> <p>20 into account people's tastes and preferences, the</p> <p>21 price of substitute goods, the price of</p> <p>22 complementary goods, income, price of labor, price</p> <p>23 of capital, price of raw materials. All of that</p> <p>24 goes into the market price that we see. That</p> <p>25 doesn't mean it gives you the demand curve or a</p>	<p>Page 137</p> <p>1 that they're willing to pay that price, but you</p> <p>2 don't know if they would be willing to pay more.</p> <p>3 Q If they say "no," do you know the</p> <p>4 consumer's maximum willingness to pay?</p> <p>5 A I already answered that. I said no</p> <p>6 because they didn't -- they didn't want to pay at</p> <p>7 least that price. So it's something less than</p> <p>8 that, but you don't know what that is.</p> <p>9 Q Are you familiar with the phrase</p> <p>10 "willingness to pay of the marginal consumer"?</p> <p>11 A Yes.</p> <p>12 Q And could you define that as you</p> <p>13 understand it?</p> <p>14 A So imagine a demand curve. Imagine</p> <p>15 a supply curve. So you have a market equilibrium</p> <p>16 price. When you talk about the marginal consumer,</p> <p>17 that's that last person that buys along the demand</p> <p>18 curve. All the intramarginal consumers -- so</p> <p>19 everybody that would have bought earlier on the</p> <p>20 demand curve -- their willingness to pay was</p> <p>21 higher. When you talk the marginal consumer,</p> <p>22 you're talking about that very last consumer that</p> <p>23 buys at the equilibrium price.</p> <p>24 Q And so the market price of a product</p> <p>25 is equal to the willingness to pay of the marginal</p>
<p>Page 138</p> <p>1 supply curve.</p> <p>2 Q Right.</p> <p>3 A But those considerations all go into</p> <p>4 a price we see.</p> <p>5 Q So it, in part, reflects the then</p> <p>6 extant supply?</p> <p>7 A I would be careful. It would be</p> <p>8 everything that I said. When you said "supply,"</p> <p>9 it's not giving you the whole supply curve. It's</p> <p>10 giving you one point on the supply curve.</p> <p>11 Q Okay. If you ask a consumer, "Would</p> <p>12 you be willing to buy product X for 999?" and the</p> <p>13 consumer responds with either a "yes" or a "no,"</p> <p>14 can you determine from that "yes" or "no" answer</p> <p>15 what the willingness to pay for that consumer is?</p> <p>16 A Not without a few more words.</p> <p>17 Q What other words?</p> <p>18 A Well, if they said "no," you don't</p> <p>19 know the willingness to pay. If they said "yes,"</p> <p>20 you don't know if the willingness to pay is that</p> <p>21 market price or some higher amount.</p> <p>22 Q So if they answer "yes," you don't</p> <p>23 know the consumer's maximum willingness to pay;</p> <p>24 correct?</p> <p>25 A That's what I'm saying. You know</p>	<p>Page 140</p> <p>1 consumer?</p> <p>2 A When you're interacting supply and</p> <p>3 demand, I would agree with that.</p> <p>4 Q Can you replicate real world</p> <p>5 conditions in an online survey?</p> <p>6 A I mean, I think the idea is --</p> <p>7 depending on the nature of the survey, I mean --</p> <p>8 actually, I put a whole bunch of assumptions on</p> <p>9 your question: that we're talking about purchasing</p> <p>10 behavior, and not figuring out who's going to vote</p> <p>11 for whom. You just said sort of a survey. So if</p> <p>12 we're talking about purchasing patterns, I think</p> <p>13 that survey -- in conducting a survey you try to</p> <p>14 replicate that to get the most information you can</p> <p>15 about the survey. That's valuable information.</p> <p>16 Q And how do you do that? How do you</p> <p>17 try to replicate real world conditions in let's say</p> <p>18 a purchasing survey?</p> <p>19 A Yeah, for all the reasons that I</p> <p>20 said. I mean, you're giving -- you give product</p> <p>21 attributes. You try to identify the important, you</p> <p>22 know, determinants of demand. You give consumer</p> <p>23 options. So all of those -- you know, all of those</p> <p>24 things we've kind of been talking about.</p> <p>25 Q As the terms are used in economics,</p>

<p>1 can you give a brief definition of "scarcity" and 2 "abundance"?</p> <p>3 A Well, the term "economics" itself 4 has to do with the allocation of scarce resources 5 across competing uses or ends in an attempt to 6 satisfy unlimited human wants. That's the 7 definition of economics. And resources are not 8 unlimited. So there's always the concept of 9 scarcity. And so the issue with economics is, 10 yeah, how do you allocate scarce resources across 11 our unlimited kind of human wants, and usually it's 12 the price mechanism that will do that.</p> <p>13 Q And I assume you'd agree that the 14 scarcity or abundance of a good or service can 15 influence the prevailing market price?</p> <p>16 A Let's be a little more precise how 17 we say this. But, generally speaking, holding 18 everything else constant, including the demand for 19 a product, the greater the supply, holding 20 everything else constant, the lower the price. The 21 smaller, the lesser the supply, the higher the 22 price.</p> <p>23 Q So holding everything else equal, 24 goods that are relatively scarce will have a higher 25 price than goods that are in relative abundance?</p>	<p>Page 141</p> <p>1 be, you know, \$100,000. But there must be a lot of 2 2001 BMW M5's out there or a lot of substitutes for 3 it such that the price is low. So but it's a 4 combination of what's the demand for the product 5 and, yes, what's the supply of the product. I 6 won't disagree with that.</p> <p>7 Q What does the term "convergence" 8 mean in the context of a hierarchical Bayes 9 estimation?</p> <p>10 A Yeah, I think it's running different 11 iterations until you get convergence to a result.</p> <p>12 Q What is a randomized first choice 13 analysis?</p> <p>14 A Yeah, I think that deals with -- 15 now, this all has to do with the survey stuff, but 16 a lot of times if you make certain assumptions of 17 how people will behave, you're always going to get 18 the same outcome that people will always buy the 19 product that gives them the greatest utility. But 20 there may be reasons why that may not happen, and 21 so you make certain assumptions in the model that 22 don't give you sort of the same outcome each time. 23 That's my understanding.</p> <p>24 Q And what does the term "error 25 distributed Gumbel" mean to you, if anything?</p>
<p>Page 142</p> <p>1 A Yeah, I want to be a little careful 2 'cause you're talking about goods that are scarce 3 and abundant, and I'm thinking in terms of where 4 that supply curve is. But to the extent that 5 there's a greater supply holding price constant -- 6 I'm sorry -- holding demand constant, the lower the 7 price.</p> <p>8 And let's be a little bit careful 9 because, obviously, you know, we're talking about a 10 scarcity, but on the supply side there's cost of 11 production, like I was saying before, and the 12 prices of inputs and everything else.</p> <p>13 Q So, for example, if I asked you to 14 estimate the value of a 1952 Mickey Mantle baseball 15 card, would you want to know how many of those are 16 in existence?</p> <p>17 A Actually, you'd want to know two 18 things. You'd want to know the demand side and the 19 supply side. I mean, I'll give you a perfect 20 example. I have a 2001 BMW M5, and this is like to 21 me the greatest car in the world, and it's 20 years 22 old and in perfect condition. And I keep thinking 23 this thing should be worth a lot of money, but 24 every time I look it up in the Kelley Blue Book 25 it's like \$8,000. You know, I'm thinking it should</p>	<p>Page 144</p> <p>1 A I don't know that I can describe 2 that. That's not necessary for what I'm doing.</p> <p>3 Q In the context of a hierarchical 4 Bayes estimation, what does the word "priors" mean?</p> <p>5 A Yeah, the "priors" would be 6 basically your prior expectations. But, you know, 7 in a hierarchical Bayesian analysis there's sort of 8 posterior results that you can use to adjust your 9 priors, and, hopefully, in a Bayesian approach that 10 gives you -- a hierarchical Bayesian approach would 11 say that that gives you, at least from their 12 perspective, a better estimate when you're taking 13 into account the priors plus certain other results.</p> <p>14 Q And what is "degrees of freedom" in 15 the context of a hierarchical Bayes regression?</p> <p>16 A Yeah, well, degrees of freedom just 17 goes into, you know, part of the statistical test 18 as well.</p> <p>19 Q Can you study a product attribute in 20 a conjoint analysis without mentioning the 21 attribute?</p> <p>22 A I really missed your question. It 23 sounded -- it sounded like another one of your 24 tautological questions.</p> <p>25 Q It may be. Can you study a product</p>

<p>Page 145</p> <p>1 attribute in a conjoint survey without mentioning 2 the attribute?</p> <p>3 A Sometimes there's economics or, I 4 suppose, statistical techniques where you use 5 proxies for what you're talking about. There may 6 be a number of reasons for doing that. But 7 generally I would think the direct approach, unless 8 there's a reason to use a proxy, would be to, you 9 know, clearly identify what that attribute is, but 10 making sure that the consumer puts the proper 11 weight on that attribute in the purchase decision.</p> <p>12 Q And just to make sure I understand 13 your position, and I understand you disagree with 14 what Mr. Gaskin proposes to do, but if he 15 appropriately married a conjoint analysis with 16 appropriate analysis of supply-side considerations, 17 could that be used to estimate the value of a 18 product attribute?</p> <p>19 A So he would need to make sure he has 20 the right determinants of demand, in other words, 21 what are all the attributes that are important 22 considerations in the purchase decision. He would 23 need to make sure that the descriptions of those 24 attributes are accurate. Because sometimes you can 25 have an attribute, but it may not really have the</p>	<p>Page 147</p> <p>1 March 1st, 2021; correct?</p> <p>2 A Yes.</p> <p>3 Q What were you asked to do when you 4 were engaged in this case?</p> <p>5 A What I was asked to do was two 6 things. And it's explicitly stated in paragraph 3 7 of my report, which carries over to page 3, but it 8 was to evaluate the proposed methodology for 9 evaluating classwide damages using common proof 10 put forth by Mr. Gaskin and Mr. Weir, but then also 11 evaluate whether -- you know, the issue of whether 12 that's even feasible or you need individual 13 inquiry. So if you go to page 2 that starts in 14 paragraph 3 that I was requested to do the 15 following, and that's listed at the top of page 3 16 in subparagraphs a. and b. to paragraph 3.</p> <p>17 Q And your report is dated March 1st, 18 2021. When were you first contacted about this 19 engagement?</p> <p>20 A I believe, roughly speaking, I want 21 to say in February at some point or maybe a little 22 earlier. It was after the first of the year, but 23 clearly before March 1st. I believe it was in --</p> <p>24 Q That's one of those tautologies, I 25 think.</p>
<p>Page 146</p> <p>1 proper description to say what's going on. The 2 important demand-side factors, the important 3 supply-side factors. If you include all of that, 4 that would be, you know, a quantum leap in terms of 5 what's being, you know, proposed here. So at a 6 minimum, yes, you have to bring in the supply side, 7 but you have to make sure you have the proper 8 demand considerations as well.</p> <p>9 MR. MARKOVITS: And, Susan, I don't know 10 if I provided this to you. Did I provide you the 11 exhibits I intended to use?</p> <p>12 THE COURT REPORTER: No, I have not 13 received them.</p> <p>14 MR. MARKOVITS: I will get you one.</p> <p>15 Q But we're going to look now -- in 16 fact, Dr. Ugone has in front of him your report; is 17 that correct?</p> <p>18 A I have my report, yes.</p> <p>19 MR. MARKOVITS: Let's label that as 20 Exhibit I.</p> <p>21 (WHEREUPON, Deposition 22 Exhibit Number I was 23 marked for purposes of 24 identification.)</p> <p>25 Q And that's your Declaration dated</p>	<p>Page 148</p> <p>1 A I think it may have been in early 2 February roughly. Right around that time.</p> <p>3 Q How were you contacted?</p> <p>4 A I'm sorry. How was I contacted?</p> <p>5 Q Yes.</p> <p>6 A By phone I think it was. Phone or 7 -- I believe to the best of my recollection.</p> <p>8 Q Who contacted you?</p> <p>9 A I believe it was Dan Offenbach, I 10 believe.</p> <p>11 Q And had you worked with --</p> <p>12 A But it was -- a lot of times it was 13 Mr. Offenbach and Tom as well.</p> <p>14 Q And had you worked with either Dan 15 or Tom before?</p> <p>16 A No.</p> <p>17 Q Do you know how they got your name?</p> <p>18 A No.</p> <p>19 Q Since you prepared this report on 20 March 1st, other than your extensive deposition 21 preparation, have you done any work on this matter?</p> <p>22 A I'm sorry. Are you saying after I 23 issued my report on March 1st have I done any 24 subsequent work?</p> <p>25 Q Yes.</p>

<p>1 A No, other than preparing for the 2 deposition. 3 Q Which I assume didn't take much 4 preparation given your history of depositions? 5 A Well, I still had to reread 6 everything and look at the documents and everything 7 else. So I did have to come in mentally prepared. 8 Q There you go. And you said you've 9 prepared or provided similar analyses maybe 40 to 10 50 times in consumer class actions? 11 A I have conducted analyses that asked 12 similar questions. It's usually in different, you 13 know, facts and circumstances, markets and 14 products. So I have to do all that work, but the 15 nature of the questions is often the same. 16 Q In fact, you've been involved in 17 cases both with Mr. Weir and Mr. Gaskin in the 18 past, haven't you? 19 A Yes, their names are well known to 20 me. 21 Q Was anyone else involved on this 22 assignment who assisted you from Analysis Group 23 let's say? 24 A Yes. 25 Q Who would that be?</p>	<p>Page 149</p> <p>1 They're both senior analysts, and they do, you 2 know, financial analysis like we see here or, you 3 know, at that level they'll also be putting 4 together the charts and the graphs and the spread 5 sheets and so forth. 6 Q Did Na or Raffi or Doris write any 7 portion of your report? 8 A So here's the way I would describe 9 this. This is my report. These are my words, and 10 I've edited it. It's what I'm comfortable with. 11 But I find that you do your best work when you work 12 in a team environment so everybody can contribute 13 to the proper analytics. So it's not uncommon that 14 I have some help in an initial typing of certain 15 paragraphs. So if somebody's got to describe -- 16 you know, if there's got to be a description in the 17 report, I might say, "Why don't you type the first 18 paragraph, then give it to me, and I'll edit it and 19 put it in my words." So, absolutely, I had 20 assistance in writing it, but it always came to me, 21 and I did the editing. It's my -- you know, my 22 words. That's just the team environment that I 23 found helps provide the best work product. 24 Q And as we discussed a little bit 25 earlier, you've written similar reports in the past</p> <p>Page 151</p>
<p>1 A So there's Na Dawson. First name is 2 spelled N-A, and Dawson is D-A-W-S-O-N. Raffi, 3 R-A-F-F-I, Snow, and Doris Li, L-I. Those would be 4 the -- that's the team, four of us. 5 Q And what did Na Dawson have 6 responsibility for? What did he do? 7 A Yeah, so she's -- 8 Q She. 9 A -- kind of my First Lieutenant. 10 She's -- I was the leader of the project. She's a 11 vice president. I've worked with Na probably 20 12 years. And, you know, generally I'll conceptualize 13 everything that needs to be done, and she also 14 helps, you know, on a day-to-day basis to make sure 15 that my requests actually get completed. 16 Q And what is her area of expertise? 17 A She's Dr. Dawson, and she has a 18 Ph.D. in economics. 19 Q How about Raffi Snow? 20 A So Raffi Snow and Doris Li are both 21 what's known as senior analysts in the firm. So, 22 you know, a position right out of college with an 23 undergraduate degree would be as an analyst, and 24 then after maybe two years or three years you might 25 get promoted to what's called a senior analyst.</p> <p>Page 150</p>	<p>1 in terms of critiquing plaintiffs' experts in these 2 areas? 3 A I -- yes, I've authored reports that 4 answer the same or ask the same questions. 5 Q Was any of this report essentially a 6 cut and paste from earlier reports? 7 A My qualifications and background 8 that section is always the same. 9 Q Other than that, any substance that 10 was cut and paste? 11 A You know, I think -- you know, there 12 was so much that was unique about this. I mean, 13 there -- I don't know that it was a cut and paste 14 because, you know, I have certain viewpoints and 15 the certain words I use that are naturally going to 16 occur as I describe something. But as I'm thinking 17 through this, I can't say that we didn't do that, 18 but I would say -- I would say 90 percent of the 19 words are case-specific to this case. I don't 20 remember like taking wholesale sections from 21 another report. I just don't think we did that. 22 Q Okay. Did you consult with anyone 23 outside of the Analysis Group regarding this 24 report? 25 A Not that I recall.</p> <p>Page 152</p>

<p>Page 153</p> <p>1 Q And I believe it says in your report 2 that you talked to Mr. Macfarlane and Babcock and 3 Larsen; is that correct?</p> <p>4 A Yes. And I clearly say that. I 5 want to make sure -- I don't know if this is a new 6 question or if you're challenging what I just said. 7 In terms of the opinions and stuff, I didn't 8 consult with another person in terms of what I'm 9 putting in the report, but I did have conversations 10 with the client, yes.</p> <p>11 Q Yeah. And apart from the 12 conversations with Larsen, Babcock, Macfarlane, did 13 you talk with anyone else for input or information 14 that might have found its way into the report?</p> <p>15 A I don't believe so. And, again, 16 let's try it this way. As an ongoing process -- 17 and I don't know if you're including them or not, 18 but, obviously, I would keep the attorneys for Sole 19 informed as to my progress. So I would do that.</p> <p>20 Q Yeah.</p> <p>21 A I did have the conversation with the 22 client -- the three individuals that you mentioned 23 to get input. But in terms of the generation of 24 the opinions, that would have come just from the 25 team I mentioned to you. So hopefully that makes</p>	<p>Page 155</p> <p>1 generally it was at the same time, I think, if I 2 remember correctly. It's been a couple of months, 3 but I think I remember talking to all of them 4 together.</p> <p>5 Q Was there more than one discussion 6 or just one?</p> <p>7 A There might have been more than one. 8 One or two. But it's in that, you know -- not that 9 this is an empirical measure, but less than a 10 handful. I think it was like one or two.</p> <p>11 Q And for how long roughly did you 12 speak with those gentlemen?</p> <p>13 A Probably -- you know, it could have 14 been a half an hour to an hour each time. I know 15 -- my little hesitation is we spent more time when 16 we were trying to understand the Google data, and I 17 still think the others were on the line when we 18 were doing that. I don't think that was a 19 conversation just in isolation. But generally I 20 think each time -- if I had two conversations, they 21 would have been a half an hour to an hour each.</p> <p>22 Q Did you take notes during those 23 conversations?</p> <p>24 A Anything we have, we put into the 25 report. I mean, that's sort of the notes. In</p>
<p>Page 154</p> <p>1 it all clear.</p> <p>2 Q I'm talking about whether you might 3 have talked to somebody from Dick's Sporting Goods 4 or from Dyaco, which is the parent company, let's 5 say, or from the motor manufacturer, whoever?</p> <p>6 A No. No, I would have -- I would 7 have told you. 'Cause it's my understanding if I 8 -- yeah, if I'm having those conversations that I 9 need to reveal that as the basis for my opinion. 10 So I've given you the three individuals and the 11 source documents.</p> <p>12 Q And do you know whether either Na, 13 Raffi, Doris or anyone else in Analysis Group 14 talked to anyone other than Macfarlane, Larsen or 15 Babcock?</p> <p>16 A I would say I am 99.99999 percent 17 sure they did not. We're approaching a hundred 18 percent. Nobody ever said to me that they did 19 that, and just the way I run engagements, I would 20 be shocked if they had -- had not told me.</p> <p>21 Q In terms of your discussions with 22 Mcfarlane, Larsen and Babcock, did that occur all 23 three at once, three separately? How did those 24 discussions occur?</p> <p>25 A Boy, I'm trying think. I think</p>	<p>Page 156</p> <p>1 other words, what did we talk about? We knew what 2 we were going to talk about, and then we footnoted, 3 you know, that we had the conversation. So I did 4 not take notes.</p> <p>5 Q So there's no notes separate from 6 what's in the report?</p> <p>7 A That's correct. I tried to identify 8 for you that which we got, frankly, from the 9 depositions, that which we got from conversations. 10 Sometimes it was an overlap, so I might just 11 reference the deposition because what they told us 12 was consistent with the deposition that I got 13 independently.</p> <p>14 Q Does Exhibit 1, this report, contain 15 all the facts and data considered by you in coming 16 to your opinions?</p> <p>17 A Just so there's no confusion, 18 Exhibit 3 to Ugone Exhibit 1 contains all the 19 facts, data and other information relied upon. But 20 I would say just in an abundance of caution, you 21 would either find that in Exhibit 3 to Exhibit 1 or 22 in the footnotes to the narrative or the footnotes 23 to the associated exhibits, but you have everything 24 I'm relying upon.</p> <p>25 Q Okay. And in terms of exhibits,</p>

<p>1 does this report contain any exhibit that you 2 intend to use to summarize or support your 3 opinions? 4 A Now or later? That's what I'm 5 missing. 6 Q Now. 7 A Maybe I don't understand the 8 question. My opinions are based upon -- first let 9 me take a step back. When I talk about my report, 10 in my report there's the narrative section, which 11 is 62 pages, and then there's the exhibits. I call 12 the exhibits the exhibits, the narrative the 13 narrative, and it's the exhibits plus the narrative 14 is what makes up my report. And so all of the 15 support for that is in the self-contained document. 16 I don't know if that answers your question or not. 17 Q Well, are there any other exhibits 18 that you intend to use -- let's say there's a class 19 certification hearing, and you're being asked about 20 this report. Are there any other exhibits that you 21 would intend to use to summarize or support your 22 opinions in this report? 23 A Okay. That's why I was asking 24 whether you were talking about now or later. 25 That's why I was --</p>	<p>Page 157</p>	<p>1 A I don't have their total -- I don't 2 have Miss Snow or Li. I think Dr. Dawson might 3 have had -- I'm doing this off the top of my head, 4 but I think she might have had double the amount of 5 hours I had. She might have had like 120. 6 Q Do you know -- in terms of dollars, 7 do you know how much you billed versus the total 8 bill? 9 A Yeah, actually I don't -- I sort of 10 don't look at that. I mean, if anything, you know, 11 we submit a bill to the client. I will admit that 12 we're late doing that. So I -- you know, that's a 13 bad. But I don't have the individual for me. I 14 have, you know, roughly that this total project up 15 to issuing might be around \$200,000 or so. 16 Q If you'd turn to page 3 of your 17 report. In 5.a. you state as your first conclusion 18 that neither Mr. Gaskin nor Mr. Weir have actually 19 performed or implemented the methodologies they 20 proposed. 21 A In this matter. 22 Q Yes. Do you see that? 23 A Yes. So whether you call that a 24 conclusion or an observation, you know, I'm just 25 putting that up front and center that they're</p>	<p>Page 159</p>
<p>1 Q Fair enough. 2 A -- asking that question. Those 3 exhibits -- if I were to do something at a hearing 4 and if the judge wanted to hear the testimony of 5 the experts at the hearing, I would probably put 6 some demonstrative exhibits together, but I have 7 not done that, so they don't exist. But I could 8 see having an exhibit that, you know, has a supply 9 and demand curve on it and show the demand curve 10 moving. But I haven't put that together for this 11 hearing, nor anticipated about that or been asked 12 to do that, so that hasn't been done, so they don't 13 exist. But I could see a situation where what's in 14 my report I might turn into demonstratives. 15 Q How many hours have you billed -- 16 you personally billed on this matter through the 17 filing of the report? 18 A Yeah, I got kind of a request 19 yesterday to take a look at that, and so things are 20 happening quick. But I was able -- I had somebody 21 look at it to give me a rough estimate. But I 22 think up into the filing of the report I think it 23 was about 60 hours for me -- me personally. 24 Q Right. And then how much for Na, 25 Raffi, Doris or anybody else at Analysis Group?</p>	<p>Page 158</p>	<p>1 making a proposal, but they haven't implemented it 2 yet. 3 Q Well, you say that "I concluded 4 that" they made a proposal that hasn't been 5 implemented. What's the import of that to you? 6 A That a lot of times -- a couple of 7 things. One, they've proposed something. And it's 8 my experience you make a proposal, but that when 9 you actually implement it, you uncover things you 10 may not have thought of. And a lot of times what 11 you end up doing is different from, you know, what 12 you're proposing. 13 Q And I just want to make sure. Are 14 you opining in any way that they should have 15 implemented what they're proposing at this stage in 16 the case? 17 A I think it would -- I mean, I 18 actually believe that it would have been helpful 19 for them to implement to see if you're getting 20 reasonable answers. I know Mr. Gaskin and Mr. Weir 21 in prior cases have actually implemented the 22 proposed methodologies in these sort of cases at 23 this stage of the engagement. So I have seen 24 situations where they have implemented, and so 25 that's why I'm saying here that they haven't</p>	<p>Page 160</p>

<p>1 implemented. But I think the biggest concern would 2 be, you know, would they implement exactly like 3 they're saying or not? You know, they're -- I'm 4 just saying there's more certitude when you 5 actually do the implementation, and then, you know, 6 you can have a better understanding of what's going 7 on.</p> <p>8 Q And if you look at 5.c. on page 3, 9 you state, "The claimed injury and/or claimed 10 damages (if any) experienced by the putative class 11 members as a result of the challenged claims cannot 12 be evaluated reliably using a classwide or common 13 proof approach (i.e., individual inquiry is 14 required)."</p> <p>15 Did I read that correctly?</p> <p>16 A Yes.</p> <p>17 Q And I just want to make sure I 18 understand it. We've been over this a little bit. 19 But essentially you're saying that regardless of 20 the methodology employed, it would be impossible in 21 your view in this case to determine classwide 22 damages?</p> <p>23 A Reliably using a common proof 24 approach.</p> <p>25 Q If you turn to page 4, romanette v.</p>	<p>Page 161</p> <p>1 conditions. In other words, it could be the tastes 2 and preferences are changing over time. If tastes 3 and preferences are, in fact, changing over time, 4 then it's hard to do a survey today and say that's 5 what people believed five years ago. So my point 6 is that, A, it's just tough to take today's results 7 and say that that reliably tells you something 8 about yesterday, meaning five years ago. And it's 9 particularly difficult when the underlying 10 conditions have changed. The greater the stability 11 in the underlying conditions, perhaps the greater 12 reliability of backcasting.</p> <p>13 Q And is the primary change in 14 conditions that you're positing here the COVID-19, 15 or are there other changes and conditions during 16 the class period that you're alluding to?</p> <p>17 A I'm just giving that as an example 18 'cause that's kind of the obvious one and one that 19 everybody would understand. There may be other 20 ones, but there's been no -- I guess part of the 21 point would be there's no testing, you know, on the 22 part of plaintiffs' experts to say that nobody's 23 tastes and preferences have changed in the last 24 five years.</p> <p>25 Q And what testing could they do to</p>
<p>Page 162</p> <p>1 A I'm there.</p> <p>2 Q Talks about the length of the class 3 period, and you say, "Given the length of the 4 claimed class period, and especially given the 5 underlying change in market conditions with the 6 COVID-19 pandemic, Mr. Gaskin's proposed CBC 7 analysis cannot provide a result that is applicable 8 to the entire length of the putative class period."</p> <p>9 A Yes. I'm sorry. I didn't mean to 10 --</p> <p>11 Q That's okay. Assuming an otherwise 12 appropriate CBC analysis, for what period of time 13 would it be applicable in your view?</p> <p>14 A My view is that with a survey that 15 gives you current -- actually, I'm going to give an 16 answer, and you tell me if I understood your 17 question properly.</p> <p>18 With a survey you're getting current 19 viewpoints. It's very difficult to say to 20 somebody, you know, "What were your thoughts five 21 years ago?" So that's tough to do in a survey. 22 But you can try to get their -- their perceptions 23 as of today. My point is that the ability to use 24 today's results for a prior time period degrades 25 with if there's greater changes in underlying</p>	<p>Page 164</p> <p>1 determine whether anybody's taste or preferences 2 have changed in the last five years?</p> <p>3 A Well, they could -- you know, there 4 could be other -- you know, there could have been 5 other surveys done in the normal course of 6 business. There could be -- you know, looking at 7 the introduction of new products. There could be 8 even looking if products have changed over time. 9 They could be looking at, you know, who knows, 10 various tradeoffs between going to a gym or working 11 at home. I mean, those are all off the top of my 12 head in response to your question. But there could 13 be a number of indicators as to whether, you know, 14 there's been an underlying change in taste and 15 preferences that would invalidate taking today's 16 result and backcasting those results to an earlier 17 period in time.</p> <p>18 Q Is there any literature that you can 19 cite to with regard to the appropriateness of 20 backcasting a CBC analysis, when it can and can't 21 be done and for what time periods?</p> <p>22 A Yeah, I'm not -- I'm not aware of 23 any.</p> <p>24 Q So you're not relying on any 25 particular research study or literature in your</p>

<p>1 conclusion that this five-year period may have 2 degraded the reliability of the results? 3 A I'm just relying upon my own -- my 4 own analysis here, plus the intuition -- I think it 5 is -- I think it is recognized. You probably will 6 see in the literature and maybe even the Sawtooth 7 literature. So maybe I'll modify my answer a 8 little bit that the results of the survey usually 9 reflect -- and I think the surveys admit this -- 10 reflect the current viewpoints or current state of 11 conditions, current environment. I think that's 12 generally accepted by the surveys. 13 Q It has been about an hour. Do you 14 want to take a five-minute break? 15 A Sure, that will work. 16 (Whereupon, a recess was taken.) 17 Q Doctor, if you can turn to page 5 of 18 your report, looking at 8.b.i, which says, 19 "Putative class members who were satisfied with 20 their purchases and with the performance of the 21 challenged products were not harmed (i.e., they 22 received the value for which they paid.)" 23 Do you see that? 24 A I do, yes. 25 Q I want to explore that a bit with </p>	<p>Page 165</p> <p>1 suppose it's established there's a price premium 2 related to the horsepower claims. Are you saying 3 that despite paying a price premium, a consumer has 4 not been harmed if they're satisfied with the 5 purchase? 6 A Yeah, I guess what I'm saying is -- 7 and I apologize if I wasn't answering your 8 question. I thought I was answering your question. 9 What I'm saying is -- is that these consumers many 10 of them appear to be very, very happy with the 11 nature of their purchase. And so they at least 12 received value equal to or greater than that which 13 they paid. That's what I'm saying. 14 Q And here you have the words in 8.B.i 15 "were not harmed." So I go back. Are you saying 16 that despite paying a price premium, a purchaser 17 who is happy with their treadmill has not been 18 harmed? 19 A Yeah, well, you stopped before the 20 parenthetical. It says, "were not harmed (i.e., 21 they received the value for which they paid)." So 22 that's how I'm defining "harm" in that point. It 23 wasn't like they got value less than what they 24 paid. 25 Q And is that concept -- is that based </p>
<p>1 you because I want to make sure I understand your 2 point. Are you saying despite the fact that there 3 may be a price premium, a consumer has not been 4 harmed if they're satisfied with their purchase? 5 A Just one second here. (Reviewing) 6 Yes. So what I'm saying is -- and the only thing I 7 wanted to direct you to is that, as you know, this 8 is the Summary Of Opinions. So you've asked me to 9 look at 8.b.i. The detail is on page 37, 38 and 10 39, as you know, so this is just a summary. 11 But, yes, what I'm saying is, I mean, 12 when you get these treadmills, and as we talked 13 about previously the treadmills aren't defective. 14 In the but-for world the treadmills would not 15 change in terms of their performance. All of that 16 would be identical. And we have a situation based 17 on some of the detail that I give in page 37, 38 18 and 39 that many consumers of these treadmills, you 19 know, appear to be perfectly happy with the -- and 20 satisfied with the performance of the treadmill 21 that they received. So it's in that sense that 22 they got the performance that they -- you know, 23 that they purchased. The treadmill -- 24 Q Doctor, could you answer my 25 question, which was, just to focus you, if -- let's </p>	<p>Page 166</p> <p>1 on an established economic concept? Is that idea 2 of damage or harm in economic terms based on any 3 established concept that you can cite to? 4 A I'm a little confused by the 5 question. I think all of economics goes to this. 6 So maybe I'm confused by the question you're 7 asking. Let me think for a second. I'm processing 8 your question. 9 I think this goes back to my point of the 10 product is no -- is no different. They still got 11 the same value and performance, and they were 12 satisfied with that value and performance for which 13 they paid. 14 Q Okay. Let me try it this way. So, 15 Doctor, and I know this from 40 years experience in 16 this area -- you probably had about the same -- 17 that sometimes economics and the law part company? 18 A I'll agree with that, yes. 19 Q So are you saying that as a matter 20 of law a consumer who has been overcharged has not 21 been legally harmed if they're satisfied with their 22 purchase? 23 A Yeah, and I think from both of our 24 40 years we'll know that I have to answer I'm not 25 giving any legal opinions whatsoever. I can't </p>

<p>1 speak to that.</p> <p>2 Q And so you're just suggesting that</p> <p>3 from an economic viewpoint a consumer who's been</p> <p>4 overcharged has not been legally -- has not been</p> <p>5 economically harmed in terms of they received the</p> <p>6 value for which they paid if they're satisfied with</p> <p>7 their purchase?</p> <p>8 A If they received the value which</p> <p>9 they paid, they knew what the price was. A lot of</p> <p>10 these individuals may have even tested out the</p> <p>11 product before purchase. They got exactly what</p> <p>12 they paid for in the sense of the performance of</p> <p>13 the machine. And so in that sense the value --</p> <p>14 they received the value which they paid.</p> <p>15 Q Wouldn't the consumer be more</p> <p>16 satisfied if they paid less?</p> <p>17 A We've always said that it's a truism</p> <p>18 that people would always prefer to pay less rather</p> <p>19 than more I said at the very beginning. I wouldn't</p> <p>20 argue with that concept.</p> <p>21 Q Can you provide an example of a case</p> <p>22 that supports the idea that if a consumer is</p> <p>23 satisfied with the purchase, they haven't suffered</p> <p>24 harm from an overcharge?</p> <p>25 A I can't give you -- I'm not -- I</p>	<p>Page 169</p>	<p>1 A But I have seen a lot of references</p> <p>2 to value received versus price paid. I have seen</p> <p>3 those references.</p> <p>4 Q And can you give me an example of</p> <p>5 some case -- some case involving some product where</p> <p>6 you've seen those references?</p> <p>7 A Yeah, I can't give you a case</p> <p>8 citation. I mean, all I know is that, you know,</p> <p>9 frankly, I evaluate a lot of these cases from the</p> <p>10 perspective of whether classwide damages can be</p> <p>11 evaluated and reliably used in common proof. And,</p> <p>12 you know, there's been quite a few cases where at</p> <p>13 least the totality of my analysis the courts have</p> <p>14 agreed with things that I'm saying. I don't know</p> <p>15 that I can point to individual sentences or</p> <p>16 anything, but the types of analyses that I say</p> <p>17 "here for your consideration to look at" courts</p> <p>18 have agreed with some of the things that I've been</p> <p>19 saying.</p> <p>20 Q And sometimes they haven't?</p> <p>21 A Yeah, no one's a hundred percent in</p> <p>22 the litigation world.</p> <p>23 Q I see in your reports that you've</p> <p>24 consulted on price fixing cases, and I think I</p> <p>25 might have mentioned I have a background in</p>	<p>Page 171</p>
<p>1 can't give you legal citations. I'm giving an</p> <p>2 economic analysis. And the way I think about it</p> <p>3 is, I'm providing economic guidance to the trier of</p> <p>4 fact. The trier of fact will then take whatever</p> <p>5 economic guidance I give and whatever economic</p> <p>6 guidance the plaintiff experts give, and then make</p> <p>7 the proper determination as to whether the class</p> <p>8 should be certified or not. Now, there's many</p> <p>9 different dimensions. I know it doesn't hang just</p> <p>10 on this. So I'm not saying that, but this is just</p> <p>11 one component of that.</p> <p>12 Q And in the hundred or more --</p> <p>13 hundreds probably of cases that you've either</p> <p>14 consulted on or testified in, has any court adopted</p> <p>15 the idea that because a consumer is satisfied that</p> <p>16 despite an overcharge they have not been harmed?</p> <p>17 A Yeah, so, first of all, I mean,</p> <p>18 that's the assumption of an overcharge as opposed</p> <p>19 to an actual proved overcharge. So let's just put</p> <p>20 that as a parenthetical off to the side. I know</p> <p>21 that a lot of -- I've seen a lot of opinions,</p> <p>22 although I am not giving a legal opinion. So don't</p> <p>23 go running off saying I'm giving a legal opinion.</p> <p>24 Q I understand that. I understand</p> <p>25 that qualification.</p>	<p>Page 170</p>	<p>1 antitrust. So let's use an example from antitrust.</p> <p>2 I used to teach antitrust, so let's use -- I'm not</p> <p>3 an economist. I probably deposed a hundred</p> <p>4 economists and read a thousand economist reports,</p> <p>5 but let's use the fictional widget.</p> <p>6 A Okay. All right.</p> <p>7 Q So two companies fix the price of a</p> <p>8 widget, engage in price fixing so that the widget</p> <p>9 is ten dollars higher than it would be in the</p> <p>10 but-for world, and antitrust liability is found</p> <p>11 let's assume. All right?</p> <p>12 A Okay.</p> <p>13 Q Wouldn't consumers who paid that ten</p> <p>14 dollar overcharge for the price-fixed widget have</p> <p>15 been damaged in the amount of ten dollars even if</p> <p>16 they were satisfied with the performance of the</p> <p>17 widget?</p> <p>18 A Yeah, I mean, I think it's a</p> <p>19 different cause of action. I can't compare, you</p> <p>20 know, in the antitrust sense versus in the consumer</p> <p>21 class action sense, but there are times -- I'm not</p> <p>22 denying that at times there's overcharge</p> <p>23 calculations which serve as a basis for -- you</p> <p>24 know, for damages. I'm not disputing that.</p> <p>25 Q I'm not asking for -- I'm trying not</p>	<p>Page 172</p>

<p>Page 173</p> <p>1 to get you into talking legalese or lawyer stuff 2 here. Just as an economist, speaking as an 3 economist, would a consumer who paid a ten dollar 4 overcharge resulting from a price-fixed product be 5 harmed from an economic point of view regardless of 6 their satisfaction with that product?</p> <p>7 A I mean, they could be. The point 8 I'm trying to make in what you are asking me about 9 is is there any question about the value received 10 versus the price paid? And for those consumers, 11 the value received was greater than the price paid, 12 and that's for a large percentage of customers, 13 especially when they're experience type goods. So 14 I'm giving that information in the totality of my 15 report to the trier of fact. How that's then 16 incorporated into, you know, the many different 17 dimensions of, you know, the class certification 18 decision I leave that up to the judge.</p> <p>19 Q Let me just try one more example, 20 and then maybe we'll move on. I know you said you 21 have a Honda hybrid. Do you know anybody who has a 22 Tesla?</p> <p>23 A No. I've got the much cheaper Honda 24 Civic. In fact, I have two Honda Civic hybrids.</p> <p>25 Q Good ecologically-sound cars.</p>	<p>Page 175</p> <p>1 Q Well, it's the same product. Here 2 you're -- it's the same idea. Here you're paying 3 for -- you may pay more for a 3.5 versus a 3 4 horsepower motor, but you may get the exact same 5 product. In which case, hasn't that consumer 6 overpaid?</p> <p>7 A I mean, for some reason I'm not -- 8 I'm not seeing the analogy. It seems -- it seems 9 different. The best I can do is what I've studied 10 are the treadmills here. And, you know, the point 11 I'm making is that, you know, on one rating system 12 80 percent of the people are satisfied with the 13 product. On another rating system, you know, 67 14 percent of the people are four-star or above 15 satisfied with the product. The product wouldn't 16 be any different. The performance of the product 17 is the same, and people are getting the workout 18 that they want. So it's for all of those reasons 19 that I was saying the value received is greater 20 than, you know, or equal to the price paid. So 21 that's my analysis on this particular product.</p> <p>22 Q Let's suppose an economic analysis 23 would show that in a but-for world a 3.0 horsepower 24 treadmill would cost \$500 less than a 3.5 25 horsepower. Right? Do you follow me so far?</p>
<p>Page 174</p> <p>1 So with regard to the Tesla, I know for 2 certain models you can pay \$2,000 for a software 3 upgrade that will increase your zero-to-60 time by 4 a half a second. Apparently some people pay for 5 that. I wouldn't --</p> <p>6 A Okay. All right.</p> <p>7 Q -- but some people care about that, 8 so they'll pay \$2,000 and get a half second 9 acceleration boost. Suppose that claim was false 10 and fraudulent, that the upgrade does nothing --</p> <p>11 A Right.</p> <p>12 Q -- and liability is found. Hasn't 13 every consumer who paid that \$2,000 been harmed, 14 even if they're satisfied with the performance of 15 their Tesla?</p> <p>16 A The -- again, it depends on the 17 facts and circumstances, but you also have a 18 product that's different in terms of performance 19 relative to that which was advertised. In other 20 words, you paid to get a half second or whatever 21 you said it was, you know, a half second 22 acceleration -- speed of acceleration from zero to 23 60 when, in fact, you got an inferior product. So 24 that I think puts it in a different bucket than 25 here the product's exactly the same.</p>	<p>Page 176</p> <p>1 A I'm with you.</p> <p>2 Q All right. And let's suppose that 3 there's a claim that what I've received is a 3.5 4 horsepower treadmill. So I've paid that extra 5 \$500, but, in fact, I've got a 3.0 horsepower 6 treadmill. I never know the difference. I'm 7 satisfied, but I've paid \$500 more. Haven't I been 8 damaged by 500?</p> <p>9 A Yeah, I don't know if the answer is 10 500. I'm not going to disagree with you. There's 11 times that a price differential could show up as 12 damages. I think in that situation if there was 13 indeed a \$500 difference due solely to a half -- a 14 0.5 unit increase in horsepower that there would be 15 more dynamics going on rather than you just saying, 16 "Hey, I didn't know the difference." I think if 17 there was --</p> <p>18 Q So if -- I'm sorry. Go ahead.</p> <p>19 A No, it's okay.</p> <p>20 Q If they could have bought the same 21 treadmill for \$500 less, haven't they been damaged 22 by \$500?</p> <p>23 A That might be -- that might be an 24 inclination that the price would have been less. I 25 mean, it's subject to empirics. I mean, you've</p>

<p>Page 177</p> <p>1 made an awful lot of assumptions just, you know, 2 that they don't notice the difference. I think you 3 might even be saying -- I don't know if you're 4 saying the performance is the same or not. You're 5 saying that there's a \$500 difference that's solely 6 due to the half horsepower increment. So that's -- 7 you know, it just seems like a different set of 8 facts. But I think one could set up where price 9 differentials are a measure of damages. The 10 question is, does it apply to everybody? Do you 11 say that every single person has been damaged? And 12 I'm suggesting that there's a number of different 13 dimensions to look at.</p> <p>14 Q And what I'm --</p> <p>15 A And that the court, you know, should 16 at least take those under consideration.</p> <p>17 Q And what I'm asking is if I've paid 18 \$500 for a half horsepower that's not there, and I 19 could have paid \$500 less, which we both agree that 20 I prefer to do --</p> <p>21 A Yeah.</p> <p>22 Q -- then regardless of whether I'm a 23 satisfied consumer or a dissatisfied consumer, 24 haven't I been damaged by that \$500?</p> <p>25 A Well, I think once a price premium</p>	<p>Page 179</p> <p>1 difference. Okay. And so the question is, did -- 2 has everybody been damaged because there's a \$50 3 difference that the plaintiff economists are coming 4 up with or survey experts? Well, there's some 5 people that -- like me, I got a \$50 rebate on any 6 other products I buy. Did I -- did I suffer that 7 \$50 claimed overcharge? There's other people that 8 bought on Cyber Monday or Black Friday for a 9 hundred dollars less. How do you know that those 10 people wouldn't have bought except it being on sale 11 where that on-sale price will wipe out the claimed 12 overcharge? So there's a lot of individual 13 considerations. That's why I'm saying throughout 14 my report taking the totality of it, you got to 15 look at the individual inquiry. So even within the 16 example you're giving, it's not clear to me that 17 everybody would have paid -- overpaid by \$50 18 because some people either got the reward dollars, 19 some people got loyalty points, some people bought 20 the product on sale that may not have bought it 21 unless it was on sale, and so the alleged premium 22 was wiped out by the sale price. I mean, there's 23 all those different things that are going on. So 24 that's why I'm saying, in part, you've got to look 25 at the value received versus the price paid. But</p>
<p>Page 178</p> <p>1 has been established -- maybe here's what we can 2 agree. Once a price premium's been established, 3 then one needs to look whether that's due solely to 4 whatever the alleged misrepresentation was and 5 whether it applies to all consumers or not. Those 6 are all the things that go into the determination 7 of, you know, the -- or go into the calculus of a 8 classwide damages approach. That's what I'm trying 9 to say. But there could be situations where a 10 price premium gets applied to everybody. I'm just 11 saying that you need to look at the facts and 12 circumstances of this case, and that's, you know, 13 one of the opinions I'm giving.</p> <p>14 Q I'm trying to understand. In this 15 case -- let's take this case. If there is a 16 marketwide price impact that results in a premium, 17 won't all consumers be impacted by that premium?</p> <p>18 A So everybody -- everybody -- well, 19 the answer is no. So let me go into a little bit 20 more detail. In other words, let me give you a 21 slightly -- instead of saying \$500, because that's 22 almost the price of an entire treadmill. If you 23 want to bring it to treadmill, let's say that 24 plaintiff analysis -- plaintiff experts come up 25 with their analysis, and they say there's a \$50</p>	<p>Page 180</p> <p>1 it all goes into that. It's not clear to me that 2 everybody has paid that overcharge. That's why you 3 need to have individual inquiry.</p> <p>4 One last comment, and then I'll stop.</p> <p>5 Mr. Gaskin and Mr. Weir everything I've just said 6 they don't take into account at all. Mr. Weir is 7 -- Mr. Gaskin is saying he's going to come up with 8 a price premium. Mr. Weir says he's going to apply 9 that to everybody. But we have the variations in 10 prices that I talked about where it's not clear 11 that you can just take that amount and say that's 12 how much everybody was overcharged.</p> <p>13 Q Let me just explore that for one 14 second. Let's suppose that it's determined that 15 there's -- we'll use 50 instead of 500. Let's 16 suppose there's a \$50 price premium that's paid for 17 a 3.5 horsepower as opposed to a 3.0 horsepower 18 treadmill; and I paid that for my 3.5, but, in 19 fact, it's a 3.0. All right?</p> <p>20 A Okay.</p> <p>21 Q If I get that on sale, a hundred 22 dollars off, haven't I still paid -- wouldn't I 23 rather pay \$50 less? I mean, wouldn't the --</p> <p>24 A If you --</p> <p>25 Q Go ahead.</p>

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A No, no, I'm not -- again, I'm not going back or disagreeing with the concept that people would prefer to pay less rather than more. But the fact of the matter is, the claimed overcharge is \$50, and the plaintiffs' methodology is saying everybody overpaid \$50. And I'm saying that's not true because some people got a \$50 reward card. Other people bought the product for a hundred dollars off. So they're not paying that premium.

Q One last question on this idea. If a consumer buys an F80 treadmill from Dick's and never uses it except to hang laundry, which is at times what my treadmill is used for, wouldn't they still be better off if they paid less for the treadmill?

A Yeah, I think where we've agreed numerous times is that people prefer to pay less rather than more. I'm not disagreeing with that concept at all.

Q Could you turn to page 12, please?

A I'm there.

Q All right. Table 1. There's a chart. And the first column has the model; correct?

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A Yes.

Q And the next column has the current MSRP. Do you see that?

A Yes, yes.

Q What's the import of the MSRP?

A I am -- maybe I don't understand your question. I mean, this is how they market the goods is providing information to consumers. The manufacturer's suggested retail price, and then they have the sales price on the Sole website. So maybe I don't understand. Other than they're saying here's what the MSRP is, and here's, you know, basically today's price.

Q Do you know whether Sole ever sells its treadmills at the MSRP?

A I'm not actually going to get into the legal aspects of it, but I think there might be some aspect of -- you know, there has to be at least, you know, a period of time that a product has to be sold at a certain price before you can talk about a sale price. That's just from general background. I haven't researched it on this case, but I think I have a general understanding of something like that goes on in these types of environments or advertisements.

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Q But you personally don't know and haven't done any research as to whether Sole, for example, on its website ever sells an F63 for 1,799.99?

A Yeah, I thought that there were periods of time, or at least a long enough period of time, that would allow them to make that statement. I think that's my understanding, but I have not studied that. I'll agree with you.

Q And you see under "Today's Sale Price" on Sole's Website the F63 is the 999.99; correct?

A Yes.

Q F65 is 1,399.99?

A Yes.

Q And F80 is 1,599.99; correct?

A Yes.

Q Do you know whether those have different motors?

A I can actually tell you.

Q Are you looking at something in your report?

A Yeah, I turned to an exhibit. I'll tell you exactly when I get there. So the -- I do know the F80 has the 3.5 motor -- 3.5 horsepower.

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And the F63, as I understand it, has a 3.0 horsepower motor. I mean, I can look up the other one if you want, but --

Q And that's the horsepower claims; correct?

A Yes.

Q Okay. My question was a little different. Do you know if they have the same motor?

A Oh, oh, oh. I'm sorry. I'm sorry. I believe that's somewhere in my report. So you're going to have to bear with me.

Well, maybe I'm confused. Maybe let's do it the easy way. One's 3.5 horsepower. The other is 3.0 horsepower. I'm confused by the question because why wouldn't that tell you it's different motors, unless you're telling me they use the same motor and just call one 3.0? I'm confused by the question.

Q All right. Let's assume they use the same motor and call one 3.0 and one 3.5.

A Yeah, I don't -- I don't know. I think somewhere in my report I remember having like model numbers or something of the motor, but I don't know that I can quickly find that for you.

<p>Page 185</p> <p>1 Q And if you look at the MSRP column</p> <p>2 there, from top to bottom goes from the lower price</p> <p>3 to the higher price for MSRP; correct?</p> <p>4 A It's -- I mean, the models are --</p> <p>5 the models are rank ordered in terms of sort of</p> <p>6 attributes and price. So, yes.</p> <p>7 Q Generally. And if we were to add</p> <p>8 another column for horsepower, as the price goes up</p> <p>9 from the lowest price at the top to the higher</p> <p>10 prices on the bottom generally, it also goes from</p> <p>11 the lower horsepower to the higher horsepower;</p> <p>12 correct?</p> <p>13 A Not -- I'm going to use a fancy</p> <p>14 word. Not monotonically. In other words, I think</p> <p>15 there's a series of them that have the same -- I</p> <p>16 think there might be a 2.5. There might be a 4,</p> <p>17 and then there's a 3. But I also think there's a</p> <p>18 number of 3.5's. I mean, we can look them up. I</p> <p>19 can try to find them in my report.</p> <p>20 Q No, that's all right. Can you look</p> <p>21 at your Exhibit 5? And let's look at page 1 of 6</p> <p>22 for the F80.</p> <p>23 A I'm sorry. I lost you. We're on</p> <p>24 Exhibit 5?</p> <p>25 Q Exhibit 5, page 1 of 6 for the F80.</p>	<p>Page 187</p> <p>1 A I believe that -- just give me one</p> <p>2 second here. Just give me one second. I believe</p> <p>3 that's the revenue received by -- derived from the</p> <p>4 revenue received by Sole.</p> <p>5 Q So that wouldn't be the list price</p> <p>6 of Dick's or what Dick's is selling it for. That's</p> <p>7 what Dick's -- the revenue Dick's is paying to Sole</p> <p>8 on average for each F80 treadmill for each of those</p> <p>9 months?</p> <p>10 A As I sit here, that's my</p> <p>11 understanding and recollection, yes.</p> <p>12 Q And --</p> <p>13 A Let me -- just give me 30 seconds on</p> <p>14 one thing just real quick. It's not going to</p> <p>15 change my answer, but I just want to look up one</p> <p>16 thing here.</p> <p>17 Q You can even change your answer if</p> <p>18 you like. That's just how easy I am.</p> <p>19 A Yeah, I was hoping to find a</p> <p>20 sentence -- I know it's in my report somewhere --</p> <p>21 to confirm and point you to a sentence that says</p> <p>22 what my answer was, but I'm --</p> <p>23 Q I'm just looking for what you</p> <p>24 understand as you sit here today.</p> <p>25 A Right.</p>
<p>Page 186</p> <p>1 If you've got the --</p> <p>2 A Okay. I'm there. I'm there.</p> <p>3 Q You got it?</p> <p>4 A Yes.</p> <p>5 Q That shows for January 2015 to</p> <p>6 December 2020 Monthly Unit Sales, Average Price and</p> <p>7 Invoices by sales channel; is that correct?</p> <p>8 A Yes.</p> <p>9 Q Okay. Let's just take monthly</p> <p>10 average price. I just want to make sure I</p> <p>11 understand this. If you look at Dick's Sporting</p> <p>12 Goods, the monthly average price for the F80 is</p> <p>13 \$945 every month; correct?</p> <p>14 A I'm sorry. I may not -- I</p> <p>15 apologize. Which model are you on?</p> <p>16 Q F80. Page 1 of 6 for the F80.</p> <p>17 A Okay. I'm sorry. I was on the</p> <p>18 wrong one.</p> <p>19 Q Because on this exhibit there's 1 of</p> <p>20 6 for the F63 and then 1 of 6 for the F80.</p> <p>21 A I apologize. I was on the F63. I'm</p> <p>22 sorry. Yes, it's 945.</p> <p>23 Q All right. Is that the price that</p> <p>24 Dick's paid to Sole is it your understanding, or</p> <p>25 what does that price reflect?</p>	<p>Page 188</p> <p>1 Q In terms of the column or the row</p> <p>2 with regard to Internet under Monthly Average</p> <p>3 Price, what do you understand that dollar amount to</p> <p>4 reflect?</p> <p>5 A I believe that would be the revenue</p> <p>6 to Sole. That's Sole's price.</p> <p>7 Q That would be the revenue --</p> <p>8 A As opposed to the wholesale price to</p> <p>9 Dick's.</p> <p>10 Q So that would be the revenue to Sole</p> <p>11 just from their website or from other internet</p> <p>12 sources?</p> <p>13 A I believe it's just from Sole,</p> <p>14 'cause Amazon is separate, as one example.</p> <p>15 Q So if in certain months the F80 is</p> <p>16 being listed on the website as 1,499.99, what</p> <p>17 causes it here to be an average price of less than</p> <p>18 that if you know?</p> <p>19 A Because I think there's times that</p> <p>20 people -- well, this was everything that I said</p> <p>21 previously. That Sole monitors, for example,</p> <p>22 Dick's Sporting Goods. And Dick's Sporting Goods</p> <p>23 from time to time will change their price. Sole</p> <p>24 has no control over that whatsoever, but they</p> <p>25 always try to make sure that the internet price, my</p>

<p>Page 189</p> <p>1 understanding, for Sole matches and is not higher 2 than what Dick's is doing. So if Dick's for 3 whatever reason has a sale or does something with 4 Cyber Monday or Black Friday, my understanding is 5 Sole tries to match that such that they don't have 6 a higher price than what's at Dick's. So if 7 there's any variation in what's going on at Dick's, 8 you'll see a variation in the internet price as 9 well, which leads to the weighted average price 10 kind of moving around. That's kind of what you're 11 asking.</p> <p>12 Q Yeah, in part. But in some months 13 -- it's my understanding from testimony and from 14 documents I've reviewed that in some months it's 15 1,499.99, and it's offered that the whole month on 16 Sole's website. So do you have any idea if that's 17 the case how all these figures are a little bit 18 below that? For example, would that be minus 19 shipping, minus taxes? Do you know how these 20 numbers are derived?</p> <p>21 A It's along the lines of I believe 22 what I told you. I don't believe that these 23 include shipping, if that's what you're asking. 24 They wouldn't include -- they wouldn't include -- 25 Q I mean, how -- do you know how they</p>	<p>Page 191</p> <p>1 Decisions. Do you see that? 2 A Yes. 3 Q We talked a little bit about this, 4 but I want to explore it a little bit more. Are 5 you aware of any literature -- can you point to any 6 literature regarding how many attributes is an 7 appropriate number for a conjoint analysis? 8 A Yes. I mean, I think I've seen that 9 that, you know, it's -- the literature is pretty 10 clear that you're not going to have a hundred 11 different attributes because that's going to 12 overwhelm the survey participant. I think I've 13 seen in the literature that it's standard to have 14 maybe five to eight attributes. So I think the 15 literature is generally accepted to limit the 16 number of attributes so that it's, you know, 17 frankly, a doable survey. But I think the emphasis 18 is to make sure that there's a -- you know, the 19 proper attributes are being communicated to the 20 survey taker and that you don't create 21 inadvertently a -- you know, a focal bias by 22 elevating something above that which would occur in 23 the actual purchase decision. So that's the 24 balancing of what a -- you know, I think a survey 25 expert has to do.</p>
<p>Page 190</p> <p>1 get from 1,499 -- aside from trying to mimic Dick's 2 from time to time, how they would get from 1,499.99 3 down to in May of 2015 1,403?</p> <p>4 A Because I think there's also times 5 that customers call and negotiate. 6 Q Okay. 7 A I mean, they explicitly told me that 8 there are some customers that call and negotiate. 9 Q And you think there's enough so that 10 -- in May of 2015, for example, that would knock 11 the average price down from 1,499.99 to 1,403? And 12 if you don't know, you don't know. That's fine. 13 A No, no, no, I'm just -- I'm just 14 looking here. No, I stand by my answer. That's 15 just my understanding. I mean, I had that 16 conversation with them, and that was the 17 explanation I got. So I've given you the extent of 18 my knowledge, but that was the explanation I 19 received. 20 Q Could you turn to page 23 of your 21 report, please? 22 A I'm there. 23 Q And I'm just looking at the heading, 24 number 3, Mr. Gaskin's Conjoint Survey Excludes 25 Important Features That Affect Consumers' Purchase</p>	<p>Page 192</p> <p>1 Q When you say you think you've seen 2 five to eight in the literature, is that the 3 Sawtooth guide or the Orme document that you 4 reference in your report or some other literature? 5 A I think -- I just have that as 6 background knowledge in my head, but it wouldn't 7 surprise me if it's also in that literature. 8 Q Beginning on the bottom of page 23 9 to page 24, you note the eight features that Mr. 10 Gaskin proposes to use; correct? 11 A Yes. 12 Q And what more important features do 13 you believe need to be added? 14 A Well, I think with respect to why 15 people are buying the Sole product, you know, I 16 think it would be valuable information, just as one 17 example, that when you turn to the next page that 18 the F63 has been rated Best In Class, Best In Price 19 Range in 2021, Best Buy in 2021, Great Price For 20 Quality 2021. The F80 similarly has those sort of 21 accolades and types awards. So that's providing 22 additional information to the -- you know, to the 23 consumer and, you know, frankly, goes into, you 24 know, the demand for the product and the pricing of 25 the product. I think the Sole products are known</p>

<p style="text-align: right;">Page 193</p> <p>1 as, you know, quality products, you know, at a very 2 reasonable price. So, you know, that's just one 3 example. But what I tried to do is in paragraph 4 48.a.i., ii., iii. and iv., you know, give, you 5 know, indicators of additional, you know, 6 information that would be important for a survey 7 that, you know -- 8 Q Let's just take them one at a time. 9 So you're talking about ratings or accolades or 10 awards. Would that be one -- 11 A As one example. 12 Q All right. Would you add those to 13 the eight features that Mr. Gaskin already has or 14 proposes for his conjoint survey, or would you 15 substitute that category for one of those features? 16 A Yeah, I haven't made that 17 determination. I'm saying those are important 18 determinants of the purchase decisions of the 19 consumer. 20 Q And do you think that those are more 21 important than the eight that he has proposed? 22 A I think they're very important, yes. 23 I haven't -- I haven't determined what are the most 24 important, but those are very, very important that 25 inform consumers' purchase -- purchase decision.</p>	<p style="text-align: right;">Page 195</p> <p>1 or some as five-star in terms of their reviews? 2 A You could do that. You could put in 3 a star rating attribute that said, you know, 4 three-star, four-star, five-star. 5 Q And what's your basis for 6 determining whether a factor such as this is more 7 important than other factors that are already 8 there? 9 A A., my training as an economist. 10 B., my understanding of demand drivers and the 11 consumer purchase decision. And then C., the 12 reviews that I see and all the documentary evidence 13 that I provide throughout my report on this issue. 14 Q Where is the line between important 15 and unimportant in terms of attributes or features? 16 A That could be something that is 17 tested in a presurvey. I don't think I saw that. 18 I wasn't going to get into all the different survey 19 techniques. But one way you can handle that is you 20 could have a presurvey. You could have a focus 21 group. You could try to figure all that out. 22 Q In the course of your review and 23 research, did you review any treadmill buying 24 guides? 25 A I want to -- I want to say yes to</p>
<p style="text-align: right;">Page 194</p> <p>1 Let me look here. You know, and it also kind of 2 goes to the individual inquiry issue. I mean, like 3 the running surface area, you know, there's -- 4 Q Let me just stick with ratings, 5 accolades and awards for a second. 6 A Sure. 7 Q So you think that's an important 8 attribute or feature that should be included in any 9 conjoint survey? 10 A Especially when you're talking about 11 these products, yes, 'cause they go into the 12 purchase for these products. 13 Q Okay. How would you do that? How 14 would you structure the conjoint survey to have 15 that category? 16 A If there -- I mean, there's 17 different -- in a conjoint survey there's different 18 what I'll call attributes that are presented, and 19 that could be -- an attribute could be awards or 20 recommendations. It could -- you know, so for the 21 other models it could be none, none, none. Then 22 when you get to the F80 it could be, you know, Best 23 In Class or something like that. So you would put 24 it in just like any other attribute. 25 Q Or you might put some as four-star</p>	<p style="text-align: right;">Page 196</p> <p>1 your question. I wasn't sure exactly what you mean 2 by "buying guide," but I've seen like Consumer 3 Reports. I've seen other articles on "here's the 4 types of things you may want to look for." So all 5 of that if you mean that by "buying guides," the 6 answer is yes. 7 Q And would that include -- do most of 8 the buying guides to your knowledge suggest to 9 consumers that horsepower is an important attribute 10 when buying a treadmill? 11 A I don't -- as I sit here, I don't 12 remember any saying horsepower was an important 13 attribute. 14 Q On page 24 at the very top of the 15 page, first full sentence, you say, "He will inform 16 survey respondents that any other features not 17 shown on the survey are assumed to be the same for 18 all of the treadmills presented." 19 Do you see that? 20 A I do. 21 Q Is there anything wrong with 22 informing respondents of that? 23 A Yes, because not all of them can be 24 Best In Class. Not all can be Best In Price Range 25 in 2021. Not all can be Best Quality For Price in</p>

<p>Page 197</p> <p>1 2021. Not all of them can have -- I saw in some of 2 the reviews no deficiencies noted. 3 Q And I'm getting away from ratings, 4 accolades and awards, and I'm just asking in terms 5 of conjoint analysis. When you choose eight 6 features like Mr. Gaskin proposes, is it wrong to 7 then with respect to any other possible features 8 inform respondents that they're assumed to be the 9 same for all the treadmills? 10 A I think that it's right when it's 11 not meaningful, wrong when it masks other 12 meaningful differences. 13 Q Isn't it a common practice for 14 conjoint analysis to tell survey respondents that 15 apart from the attributes that are being 16 considered, they should assume that any other 17 attribute is the same for all treadmills or 18 whatever product? 19 A It may be okay for a properly 20 developed survey. But if there's meaningful 21 differences that could affect the purchase decision 22 or the price, and you tell people that all other 23 attributes are the same, then that's masking, 24 frankly, what's the valuation -- the relative 25 values of the attributes in the survey process.</p>	<p>Page 199</p> <p>1 perspective, and we're talking about the 2 determinants of the demand for these particular 3 products. That's clearly an economic concept. 4 We're talking about prices. That's clearly an 5 economic concept. So I want to make it clear to 6 the reader that my analysis is from an economic and 7 claimed damages perspective. I'm not approaching 8 this from a survey perspective, although there can 9 be -- if you know what I mean by a Venn diagram, 10 there's going to be an overlap between what a 11 survey person may look at and what an economist 12 will look at. It's not an either/or. Both of us, 13 you know, look at some of those things. But I'm 14 always looking at it from an economic and claimed 15 damages perspective. 16 Q And wouldn't this be a criticism of 17 Mr. Gaskin's proposed survey, not conjoint analysis 18 in general? 19 A I didn't quite get the question. 20 Q Wouldn't your criticism at the 21 beginning of paragraph 48 be a criticism of his 22 proposed survey methodology rather than conjoint 23 analysis in general? 24 A Yeah, if I can maybe translate a 25 couple of the words. It's his -- this particular</p>
<p>Page 198</p> <p>1 Q Page 24, paragraph 48, says, "From 2 an economic and claimed damages perspective" -- 3 A I apologize. I missed where you 4 wanted to direct me to. 5 Q I'm sorry. Page 24, paragraph 48. 6 A Okay. 7 Q "From an economic and claimed 8 damages perspective, Mr. Gaskin's proposed conjoint 9 survey would cause participants to place greater 10 weight on the eight included features in the 11 conjoint survey (including CHP) as compared to what 12 they would at the time of purchase in the 13 marketplace." 14 Do you see that? 15 A Yes. 16 Q Why do you say this is from an 17 economic perspective? Isn't it from a survey 18 design perspective? 19 A No, we're talking about -- I mean, 20 one could approach it from a survey design 21 perspective, but I've always said I'm a forensic 22 economist and damage quantifier. And I want to 23 make it clear to the reader -- I mean, even though 24 you asked me a lot of survey questions, I'm 25 critiquing this from an economic and damages</p>	<p>Page 200</p> <p>1 criticism goes to his implementation, if that's 2 what you're asking. 3 Q Not to conjoint analysis? 4 A There's others that go to the 5 conjoint analysis. This one goes to the 6 implementation. 7 Q Let's talk about on page 25, the 8 first bullet above romanette iii. You say, 9 "Similarly, the F80 received" various awards 10 including "Best Quality For Price 2021." Do you 11 see that? 12 A Yes. 13 Q And you're saying something like 14 that should be included as an attribute? 15 A Well, I'm saying it's important for 16 -- my understanding is that the Sole products and 17 the F80 -- frankly, the F80 and the F63 are the 18 best sellers. I think both of them combined 19 comprise, you know, over 80 percent of their unit 20 sales, maybe even 87 percent. So those are the big 21 sellers. So the question is, what differentiates 22 those products? And both of those products -- not 23 only has it been revealed in the marketplace that 24 those are highly valued products by consumers' 25 purchasing decisions relative to all of the Sole</p>

<p style="text-align: right;">Page 201</p> <p>1 products, but it's also been recognized by 2 independent third parties as a quality product. 3 Those -- that type of information is important to a 4 consumer's, you know, purchase decision. 5 Q Wouldn't it be possible for a 6 different reviewer to also say that a Bowflex or 7 Nautilus or NordicTrack treadmill was Best Quality 8 For Price 2021? 9 A So you'd want to -- remember what I 10 said when you asked me, "How did you do this?" And 11 I said, "Well, you've got your attribute list." 12 And I gave you the simple example that if you have 13 four products it could go, you know, at awards "no, 14 no, no," and then when you get to the F80, "Yes, 15 and here is what they are." Well, if there's other 16 ones that have it, you put that in in the attribute 17 list. I'm not saying to the exclusion of the 18 others. I'm saying that's an attribute. It's 19 either "yes" or "no" or you describe what it is. 20 Q Can you point to any conjoint survey 21 analysis that you're aware of that included this 22 category of awards or accolades or reviews as an 23 attribute? 24 A Yeah, I don't -- I don't know that I 25 can do that. I don't remember one way or another,</p>	<p style="text-align: right;">Page 203</p> <p>1 the Sole products, but I have the F80, and this is 2 a huge machine. So you've got to figure out, okay, 3 I may like the treadmill, but is it going to fit in 4 the space allocated for it in my house or the 5 garage or whatever? So there's size. That can be 6 the size of the actual belt. But regardless of the 7 belt size, is the -- what is the total dimensions? 8 These are tall machines, and their length and width 9 is quite big. And if you want to put in size, I 10 mean, this thing weighs, I don't know, more -- you 11 know, 300 pounds. I mean, it was a struggle. So 12 all of those things could go into the purchase 13 decision. 14 Q And when Consumer Reports is talking 15 about size here, do you have any knowledge of 16 whether they're talking about the running surface 17 area or the total dimensions? 18 A Yeah, for some reason -- and it 19 might be later in my report -- but I took the size 20 to be the total -- the total dimensions. 21 Q And the next category is ergonomics. 22 And what did you understand Consumer Reports to 23 mean by ergonomics? 24 A Yeah, that's -- I'm trying to figure 25 out a synonymous word for that. But it's almost I</p>
<p style="text-align: right;">Page 202</p> <p>1 frankly. But I'm telling you as an economist these 2 are highly valued products that are known as 3 quality products, and that can have an influence on 4 the purchase decision and the price that's paid. 5 So quite independent of whether people put that in 6 conjoint analyses or not, I'm saying from an 7 economist point of view that's a driver of demand, 8 and that's how I'm evaluating things, as I've said 9 all along, from an economic and damage 10 quantification perspective. 11 Q Let's look at page 25, romanette 12 iii., for Consumer Reports. You note that the 13 Consumer Reports -- this is about from the middle 14 down to the bottom. You say, "Additionally, 15 Consumer Reports lists four factors consumers 16 should consider when making a treadmill purchase: 17 size, ergonomics, high-tech features and 18 adjustability. These product features are not 19 included in the survey proposed by Mr. Gaskin." 20 Do you see that? 21 A Yes. 22 Q What do you understand size to mean 23 there? 24 A Size can include actually the total 25 dimensions. I don't know if you've seen some of</p>	<p style="text-align: right;">Page 204</p> <p>1 would say, you know, for the individual the feel of 2 the -- you know, the feel of the treadmill. 3 There's some people -- and I'll admit I don't know 4 how they do this -- don't use the handles at all. 5 I find the need to have my arms on the handles. 6 And so, you know, that's what I consider to be the 7 ergonomics. If I was not comfortable with the 8 placement, maybe the height or the length of those 9 handles, for me at least that would be, you know, 10 bad ergonomics for me. So, you know, I'm always 11 very careful when I give "here's the survey of 12 one," I jokingly say, "type example," but I'm just 13 trying to give an idea to help explain what I mean 14 by that. But that's how I take the ergonomics. 15 Q And how would you address ergonomics 16 in a conjoint survey? 17 A You know, I don't disagree that some 18 of it is -- you know, some of it is more difficult 19 to measure, but there could be -- you know, there 20 could even be, you know, statements about, you 21 know, whether they -- there could be statements 22 about the ergonomics. I mean, there's products 23 that -- out there that I think are marketed-based 24 on their ergonomics. So there might be a way to 25 implement that.</p>

<p>1 Q The next feature discussed by 2 Consumer Reports it says high-tech features. 3 A Right. 4 Q What did you understand that to 5 mean? 6 A Like does it have Bluetooth? Can 7 you stick your, you know, iPod in and earplugs and 8 play music? Those types of things. 9 Q Would that include the display 10 screen and whether it has heart rate monitoring? 11 A I think it could. You could put 12 that under there. But I think as time goes on -- 13 we talked about, you know, taste and preferences of 14 today versus six years ago, and this could be one 15 area where there's certain technologies that have 16 developed over time that have become relatively 17 more important over time. And so that's an example 18 of, you know, making sure that you understand that 19 currently this is what people are either interested 20 in or Consumer Reports is saying you should 21 evaluate because maybe this is something that you'd 22 want. And I think that's the point. But that's 23 another reason to, you know, for example, do your 24 presurveys to make sure you're getting all the 25 right determinants of demand.</p>	<p>Page 205</p> <p>1 the third bullet point, third line from the bottom, 2 "Advance rolling technology" -- I take that to be 3 the belt as the belt goes around -- "that keeps the 4 Sole F80 much quieter during operation than most of 5 its competitors." And then they've got the 6 storability, storable nature of the machine as some 7 things that set the F80 apart from the competition. 8 And the point is that if -- if prices are 9 relatively the same across comparable type models, 10 but if the F80 has attributes that set it apart 11 that differentiate it from its competitors and you 12 don't put that into the survey, when you ask about 13 one attribute you may inadvertently be valuing that 14 one attribute you ask about and be giving it too 15 much weight when the customer may not realize that 16 at that price you get some other important 17 attributes as well, such as how quiet it is. Some 18 people work with, you know, earplugs, so it may not 19 matter, but other people might want to watch TV 20 while they're on the treadmill, and if it's too 21 loud it's hard to hear. That may be important. 22 Other people may want to when they're done fold it 23 up and roll it away into a closet. So that could 24 have some value and some weight. And if you don't 25 differentiate, you may inadvertently -- the point</p> <p>Page 207</p>
<p>1 Q In terms of adjustability, what did 2 you understand that to mean? 3 A I'm going to give a tautological 4 answer, but then I'll explain. Adjustability would 5 be the various gradations. So it's not just the 6 maximum. It's not just, you know, goes to 12 miles 7 per hour, the belt. Or it's just not that you get 8 a 15 percent incline. I think it's also the 9 adjustability within -- within that -- within that 10 spectrum. 'Cause not everybody is going to go to 11 12 miles per hour. Not everybody is going to go to 12 the 15 percent decline. So that may actually be, 13 you know, irrelevant, you know, for the consumer. 14 I might be too embarrassed to say what I set my 15 treadmill at, but it's nowhere close to the 12 16 miles per hour. 17 Q Me neither. 18 Apart from reviews, awards or accolades, 19 what other features would you include on a conjoint 20 survey in this case apart from the ones Mr. Gaskins 21 proposes? 22 A Well, I would evaluate either 23 through a focus group or presurvey or the various 24 reviews other items for consideration. So, for 25 example, if you turn to page 26, it talks about in</p> <p>Page 206</p>	<p>1 is may inadvertently have the survey respondent put 2 too much weight on that which is included as an 3 attribute. 4 Q If you have the attributes as 5 suggested by Mr. Gaskin, aren't any attributes that 6 aren't in that list held constant across all 7 product choices? 8 A But that may not be true. That's my 9 point. That may not be true. Those may be 10 additional differentiators. That's what this is 11 saying is that -- 12 Q But just -- whether it's true or 13 not, the instructions to the respondent would say 14 hold those constant across all product choices; 15 correct? 16 A I think that would be accurate as 17 just a statement. I don't think that it helps with 18 the evaluation of the value of the attribute -- of 19 the particular attributes. 20 Q If CHP is not a valuable attribute, 21 that will be determined from these eight factors 22 regardless of whether Mr. Gaskin includes another 23 factor that you believe to be more important, 24 wouldn't it? 25 A I don't think that's an accurate</p> <p>Page 208</p>

<p>1 statement. The magnitude will change.</p> <p>2 Q All right. Page --</p> <p>3 A I lost track. Has it been an hour,</p> <p>4 or are we short of an hour?</p> <p>5 Q It's been about an hour. Let's take</p> <p>6 five minutes, and then hopefully finish up.</p> <p>7 A Okay. Great. Thank you.</p> <p>8 (Whereupon, a recess was taken.)</p> <p>9 Q So looking at page 27 of your report</p> <p>10 under romanette vi.</p> <p>11 A Yeah, let me turn there.</p> <p>12 Q You say that "By omitting the</p> <p>13 aforementioned features, functionalities, and</p> <p>14 attributes from his proposed conjoint survey, Mr.</p> <p>15 Gaskin will in a focus-biased way focus survey</p> <p>16 respondents' attention to the few features included</p> <p>17 in the survey (including CHP) and artificially</p> <p>18 inflate the willingness to pay for these features</p> <p>19 (relative to the significant features,</p> <p>20 functionalities, and attributes considered by</p> <p>21 consumers when actually purchasing the challenged</p> <p>22 products)."</p> <p>23 Do you see that?</p> <p>24 A I do, yes.</p> <p>25 Q Do you have any basis in the</p>	<p>Page 209</p> <p>1 certain attributes, but not having what you would</p> <p>2 consider important attributes?</p> <p>3 A Yes.</p> <p>4 Q And can you point me to any</p> <p>5 particular article that you believe supports that</p> <p>6 notion?</p> <p>7 A Yeah, I think -- and I can't give</p> <p>8 you a specific citation, but I don't think it would</p> <p>9 be hard to find. You just look it up. I don't</p> <p>10 have an article for you.</p> <p>11 A Any Orme literature, any Sawtooth</p> <p>12 literature?</p> <p>13 A It wouldn't surprise me if it's</p> <p>14 there. I'm just saying I don't have a particular</p> <p>15 citation for you, but it's a common occurrence.</p> <p>16 You'll find it in all the literature.</p> <p>17 Q Under heading b. you say, "Mr.</p> <p>18 Gaskin will include CHP regardless of whether</p> <p>19 respondents identify it as an important attribute."</p> <p>20 Do you agree with that?</p> <p>21 A I do.</p> <p>22 Q If it's not important, won't</p> <p>23 respondents rate it at not important?</p> <p>24 A Just one second. Give me a second</p> <p>25 here.</p>
<p>1 literature that you can point to for that</p> <p>2 assertion?</p> <p>3 A Absolutely. I mean, it's -- so,</p> <p>4 first of all, I'm going to answer it in two parts.</p> <p>5 The first part is just from the economic</p> <p>6 perspective. By just having everything else in</p> <p>7 this --</p> <p>8 Q We've got a limited amount of time</p> <p>9 today. Not from an economics perspective. In the</p> <p>10 literature, is there any literature, any research</p> <p>11 article or article, software guide for Sawtooth</p> <p>12 software that you can point to that supports your</p> <p>13 statement?</p> <p>14 A Yes. Everywhere in the survey</p> <p>15 literature they talk about focus bias -- focus bias</p> <p>16 or focal bias. That is a common issue in surveys.</p> <p>17 Now, I'm saying that I've seen it. I was trying to</p> <p>18 make sure we all understand I'm coming at this from</p> <p>19 an economic perspective in the relative weighting.</p> <p>20 But if you want to have my understanding of the</p> <p>21 survey literature, that is absolutely an everyday</p> <p>22 issue with surveys.</p> <p>23 Q And is it in that literature -- in</p> <p>24 all the conjoint survey literature a suggestion</p> <p>25 that you're focus biasing the survey by having</p>	<p>Page 210</p> <p>1 Again, if you keep going until the end of</p> <p>2 that section b. at the romanette ii., the</p> <p>3 cautionary note is whether again that would create</p> <p>4 in a sense a focus bias or not. So that's where</p> <p>5 you have to be very, very careful in the design of</p> <p>6 the survey is my understanding. So that's the</p> <p>7 point of that section.</p> <p>8 Q I don't -- I'm confused now. Are</p> <p>9 you saying that if CHP is not important that</p> <p>10 including it will create a focus bias?</p> <p>11 A Or it could. That's where you have</p> <p>12 to be careful in the design of the survey, or from</p> <p>13 an economic perspective what are the real demand</p> <p>14 drivers. Hopefully that's uncontroversial. That</p> <p>15 if you include an attribute, you want to make sure</p> <p>16 that you don't inadvertently cause the responder to</p> <p>17 put too much weight on that attribute that they</p> <p>18 wouldn't have otherwise considered when they were</p> <p>19 deciding -- making their purchase decision.</p> <p>20 So it's a factual statement Mr. Gaskin</p> <p>21 will include CHP regardless of whether respondents</p> <p>22 identify it as an important attribute, but then the</p> <p>23 punch line is whether you make sure that you don't</p> <p>24 inadvertently create respondents putting too much</p> <p>25 weight on it.</p>
<p>Page 211</p>	<p>Page 212</p>

<p>Page 213</p> <p>1 Q And that would just be an aspect of 2 the design of the survey; correct?</p> <p>3 A I'll agree with you, sure.</p> <p>4 Q All right. Page 28, romanette ii., 5 Sole's Removal Of Challenged Claims From Its 6 Website. Do you see that?</p> <p>7 A Just a second. Yes.</p> <p>8 Q What's the import of that paragraph?</p> <p>9 A Well, it's within section b. about 10 whether CHP is important or not. And so I gave you 11 romanette i., which talks about how infrequent even 12 the concept of horsepower is in the Google ads, and 13 then in romanette ii. that it's been removed from 14 the Sole website. So that's just backing up what's 15 going on in b.</p> <p>16 Q All right. So it's been removed 17 from -- your understanding as of August 26, 2019, 18 it was removed from the Sole website, and you state 19 then, "However, sales of the challenged products 20 were not affected by this removal." Is that 21 correct?</p> <p>22 A Yeah, that's my understanding, sure.</p> <p>23 Q Are those two statements the basis 24 for the next statement, which is that in reality 25 consumers do not appear to place weight on CHP in</p>	<p>Page 215</p> <p>1 A Well, you just quoted from romanette 2 ii. when above that is romanette i., plus there's 3 everything else in my report. So you tried to just 4 read romanette ii. and say that was the only basis 5 for the conclusion. No, that's not the only basis 6 for the conclusion.</p> <p>7 Q Is it one of the bases for the 8 conclusion?</p> <p>9 A It's one of the bases for the 10 conclusion.</p> <p>11 Q Okay. And how did you conclude that 12 sales of the challenged products were not affected?</p> <p>13 A Well, I think that's also in the 14 deposition testimony of Mr. Macfarlane.</p> <p>15 Q As an economist, can you conclude 16 that sales were not affected simply by comparing 17 sales in one seven-month period to the same 18 seven-month period a year earlier?</p> <p>19 A I mean, I think you always have to 20 be careful when you're doing, you know, comparisons 21 across time. I've already said that earlier in my 22 depo here. But it's just one indicator that 23 there's been no -- there was no evidence of, you 24 know, price pressures or unit sales pressures 25 associated with the removal of that challenged</p>
<p>Page 214</p> <p>1 making their purchase decisions?</p> <p>2 A I want to see -- I don't see where 3 you're reading from. I apologize. I don't see 4 that next statement you said.</p> <p>5 Q Right underneath there above c. It 6 says, "By including CHP as one of the features on 7 the survey proposed by Mr. Gaskin, Mr. Gaskin will 8 focus survey respondents to the feature even though 9 in reality they do not appear to place weight on 10 CHP in making their purchase decisions."</p> <p>11 A Yes. I'm sorry. I didn't mean to 12 cut you off. But, yes, those two are supportive of 13 this as well. Yes.</p> <p>14 Q So you're saying, if I can 15 paraphrase, in August of 2019 they removed the 16 challenged claims from their website. They took 17 off the CHP. And the sales for September 2019 18 through March 2020 were roughly the same as from 19 the prior year during that period, which to you 20 leads to the conclusion that consumers do not place 21 much weight on CHP in making their purchase 22 decisions?</p> <p>23 A I think your statement was too 24 narrow.</p> <p>25 Q Okay. How?</p>	<p>Page 216</p> <p>1 claim.</p> <p>2 Q Did you look to see what the sales 3 trends were, that is, taking -- did you determine 4 whether taking C from the website had an effect on 5 sales in terms of sales were increasing and then 6 they stagnated from one period to the next?</p> <p>7 (Pause) Are you looking back at your 8 sales reports?</p> <p>9 A Yeah, I'm looking back at -- I mean, 10 I had that information in Exhibit 5 to Ugone 11 Exhibit 1 where I just have some charts of the F63 12 and the F80. But I was also relying upon, you 13 know, the deposition testimony as well of Mr. 14 Macfarlane.</p> <p>15 Q Could sales also have been affected 16 by new entrants in the marketplace?</p> <p>17 A Actually, I'm a little confused. In 18 general, sales may or may not, but can be affected 19 by new entrants. But I'm confused by the question 20 within the context -- if it was any way related to 21 your prior questions, I'm confused. If it was just 22 a new question --</p> <p>23 Q What I'm saying is you're saying, 24 "Look, they took the C off, and during this 25 seven-month period after they took the C off it was</p>

<p>1 the same sales roughly as the prior year 2 seven-month period when the C was on." That's what 3 I understand you to be saying; correct? 4 A Yes. That's my understanding, yes. 5 Q And I am saying, let's suppose there 6 was a new entrant into the marketplace during the 7 second seven-month period. Couldn't that affect 8 the sales? 9 A It could, but you would expect sales 10 to go down. That's why I'm confused. 11 Q Right. So they otherwise would have 12 been higher during that second month period, but 13 because of the new entrants they were the same? 14 A Right. So that's the point. If you 15 take away the new entrant, they would have been 16 higher after having taken the C off -- 17 Q Okay. 18 A -- which is -- which is 19 diametrically opposed to the theory, as I 20 understand it, that your experts are putting forth. 21 Q Right. Okay. And advertising can 22 also have an effect; correct? 23 A Yeah. Sure. 24 Q And changes in fitness trends? 25 A Yes.</p>	Page 217	<p>1 also don't get the absolute horsepower. I think 2 that's part of my understanding of what the 3 dispute's about. 4 Q If the claims even without the C are 5 still false, does that affect your conclusion? 6 A No, because it would still affect 7 the relative magnitudes. 8 Q Do you know whether Sole removed the 9 CHP claims from its literature in August of 2019? 10 A I can't speak to that. I know I've 11 looked -- I'm sorry. 12 Q Go ahead. 13 A I know I've looked at a lot of the 14 -- the website and the backup documentation, and I 15 think, you know, frankly, it gets kind of 16 complicated. But when you go to the website they 17 have the little "more" soft button, and you can 18 keep clicking that and get more detail type 19 information. And I don't think I saw the C at 20 least in those different layers or different pages 21 on the website. I can't speak totally about maybe 22 user's manuals. 23 Q Dick's is the largest seller of Sole 24 treadmills; correct? 25 A I believe that's accurate, yes.</p>	Page 219
<p>1 Q And you didn't examine any of that? 2 A Actually, I did try to examine that 3 because that's why I only took it through the 4 seven-month period up to March 2020. So I tried 5 not to go into the pandemic period, which I think, 6 you know, roughly people started seeing things 7 related to the pandemic I think around March 2020. 8 So I was actually trying to control that by not 9 taking it for a longer period of time. 10 Q Let's go to your statement that as 11 of August 26th they removed the challenged claims 12 from the website. Your understanding is they 13 removed the C from the CHP on the website; correct? 14 A They removed the C. They -- yes, I 15 think they report just the horsepower figure now. 16 Although there's other qualitative statements about 17 certain things unrelated to the disputed 18 statements, but there's I think some other 19 statements related to the motor. 20 Q Is it your understanding that 21 without the C the horsepower claims are accurate? 22 A My understanding is that there's the 23 C continuous aspect. I do believe that there's 24 some claims that you don't get the absolute 25 horsepower. Irrespective of continuous, that you</p>	Page 218	<p>1 Q Do you know whether Sole instructed 2 Dick's to remove the CHP claim from its website or 3 promotional materials? 4 A I don't know if they have the 5 ability to tell Dick's what to do, so I can't speak 6 to what Sole might have said or not said to Dick's. 7 But I think Dick's makes it own decision. I don't 8 think -- I don't think Sole tells Dick's how to 9 advertise the treadmills. 10 Q So if Dick's, the largest seller of 11 Sole treadmills as we sit here today, on its 12 website under the F80 says, "Challenge yourself on 13 a powerful 3.5 CHP motor that provides runners a 14 safer but harder routine," would that have any 15 effect on your conclusion that the removal of the C 16 had no effect on sales? 17 A You mind just reading the quote 18 again? 19 Q The first line of the product 20 information on Dick's website for an F80 is 21 "Challenge yourself on a powerful 3.5 CHP motor 22 that provides runners a safer but harder routine." 23 A Yeah, I mean, I was very clear about 24 this, that it was Sole that removed the C, I guess, 25 from its website. As I said in my answer, I don't</p>	Page 220

<p>1 believe they have control over -- over Dick's.</p> <p>2 Q Do you know whether Sole instructed</p> <p>3 Amazon to remove the CHP claim?</p> <p>4 A I have no knowledge one way or</p> <p>5 another.</p> <p>6 Q I assume, like the rest of the</p> <p>7 world, you've used Amazon from time to time?</p> <p>8 A I think it may be a -- a website</p> <p>9 that people go to occasionally.</p> <p>10 Q Are you aware that a number of</p> <p>11 products will have a section entitled "From The</p> <p>12 Manufacturer"?</p> <p>13 A This is going to sound horrible, but</p> <p>14 I'm not actually an Amazon buyer. So --</p> <p>15 Q Well, on Amazon some products will</p> <p>16 have a section entitled "From The Manufacturer."</p> <p>17 And with regard to Sole treadmills, under that</p> <p>18 section there's a chart that compares different</p> <p>19 Sole treadmills and has one basis for comparison</p> <p>20 CHP. Do you know whether Sole suggested to Amazon</p> <p>21 that they remove the CHP designations from the</p> <p>22 descriptions on their "From The Manufacturer"</p> <p>23 information?</p> <p>24 A Yeah, I don't know one way or</p> <p>25 another. It might be -- and I can't speak to</p>	<p>Page 221</p> <p>1 A Yeah, I'm making the point that he's</p> <p>2 including tainted products. You know, part of the</p> <p>3 quandary I have is I'm not sure what that's going</p> <p>4 to do. I'm not sure I can predict which way it's</p> <p>5 going to go. But I think I understand -- just bear</p> <p>6 with me here -- the NordicTrack treadmill and I</p> <p>7 think the Nautilus/Bowflex treadmills have been</p> <p>8 accused as well, or at least those are the ones</p> <p>9 that I'm knowledgeable of. And those were some of</p> <p>10 the brands that Mr. Gaskin was including in his</p> <p>11 conjoint survey, and I'm not sure which way that's</p> <p>12 going to have an effect. But let's put it this</p> <p>13 way. From a damage quantification perspective, you</p> <p>14 usually don't include impacted or tainted</p> <p>15 benchmarks. That's sort of a general rule in</p> <p>16 damage quantification, and I'm just noting that</p> <p>17 they are -- he is including two of what I would</p> <p>18 consider to be accused -- or to have accused</p> <p>19 products in other lawsuits.</p> <p>20 Q You state that Mr. Gaskin does not</p> <p>21 state whether he would inform survey participants</p> <p>22 of the allegations relating to the CHP for other</p> <p>23 products. Should he in your view?</p> <p>24 A Let me read the sentence. Bear with</p> <p>25 me.</p>
<p>Page 222</p> <p>1 whether it's out of date. I don't know how the</p> <p>2 website pages get updated. But if it's "From The</p> <p>3 Manufacturer" and if the manufacturer or Sole no</p> <p>4 longer has it on its own website, there may be a</p> <p>5 timing issue. But I'm speculating. I can't speak</p> <p>6 one way or another.</p> <p>7 Q Assuming all that Sole did was</p> <p>8 remove the C from CHP on its own website, but not</p> <p>9 the websites of other major retailers, not on the</p> <p>10 treadmill decals, would you still conclude that</p> <p>11 Sole's removal of the C from CHP demonstrates, in</p> <p>12 whole or part, that consumers do not appear to</p> <p>13 place weight on CHP in making their purchase</p> <p>14 decisions?</p> <p>15 A When you take the totality of</p> <p>16 everything in my report together, yes, it's not</p> <p>17 inconsistent with that.</p> <p>18 Q On page 28 under c. you say, "Mr.</p> <p>19 Gaskin will include in the choice sets treadmills</p> <p>20 offered by other manufacturers that allegedly</p> <p>21 contain inflated CHP claims." Do you see that?</p> <p>22 A I do.</p> <p>23 Q How would including these products</p> <p>24 in his choice sets what you call "taint" the</p> <p>25 profiles of the products used?</p>	<p>Page 224</p> <p>1 Yeah, I'm just factually stating that</p> <p>2 "Mr. Gaskin" -- let's read the sentence -- "does</p> <p>3 not acknowledge or discuss that two of the other</p> <p>4 brands he proposes to include in his choice sets</p> <p>5 are challenged products in other matters." That's</p> <p>6 a factual statement. So he doesn't acknowledge it.</p> <p>7 "Or what the effect of such inclusions may have on</p> <p>8 the reliability of his results." That's a factual</p> <p>9 statement, too. "Or whether Mr. Gaskin would</p> <p>10 inform survey participants of such allegations."</p> <p>11 And so the issue there is how much of a description</p> <p>12 does Mr. Gaskin provide to the survey respondents</p> <p>13 on all the other -- on all the other attributes.</p> <p>14 And that's part of the problem of him proposing</p> <p>15 versus actually implementing. Because when</p> <p>16 somebody implements a survey, you see exactly what</p> <p>17 their descriptions are going to be, what they</p> <p>18 include, what they don't include, and then you can</p> <p>19 give an even more complete evaluation of the</p> <p>20 survey. But without the implementation, the point</p> <p>21 is -- I'm saying here is I don't know how he's</p> <p>22 going to handle this or how far he's going to go.</p> <p>23 Q But my question is, should he inform</p> <p>24 survey participants of the allegations relating to</p> <p>25 the CHP of other products in your view? Let's try</p>

<p>Page 225</p> <p>1 to avoid a damned if you do, damned if you don't. 2 When he implements it, if he informs the survey 3 participants, are you going to say, "Oh, you 4 shouldn't have informed the survey participants"? 5 But if he doesn't, are you going to say, "Oh, you 6 should have informed the survey participants"? So 7 which one is it? Should he or shouldn't he? 8 A Yeah, I guess what I'm saying is, 9 that for general damage quantification techniques 10 you do not have tainted benchmarks. So I can tell 11 you that for sure. But then the issue is if you're 12 going to include the tainted benchmarks, do you put 13 some of that in the description? Part of the 14 problem about NordicTrack and Nautilus is at least 15 I don't know where they are in their -- you know, 16 in the litigation process and whether they're going 17 to be found to not have been engaged in wrongful 18 conduct, and that would probably inform my position 19 as to whether you should include them or not. But 20 I'm just saying something really different. What 21 I'm saying is you need to make sure that there's a 22 proper description of -- whatever the attributes 23 are, that there's a proper description. I think 24 that's really what I'm saying. So if he has a 25 proper description, I'm not going to fault him for</p>	<p>Page 227</p> <p>1 problems when you up the speed versus having at a 2 lower speed? So I'm saying that to the extent the 3 survey respondents interpret that definition 4 differently or interpret CHP differently, then 5 that's when it will not result in measuring what 6 Mr. Gaskin is attempting to measure. 7 Q Let's move on. Page 30. Page 30, 8 paragraph 51, you talk about that "Sole is 9 contesting liability." So? What difference does 10 that make? 11 A This goes again probably -- your 12 question why does this matter. This might matter 13 in terms of the information flow either to a 14 consumer or to a survey respondent in terms of, you 15 know, the different views. So it says, "I further 16 understand that the liability expert has concluded 17 that the challenged products provide the HP output 18 needed to operate the treadmills to move the 19 specific user at the desired speed during their 20 workouts, namely, 0.5 miles per hour to 12 miles 21 per hour." 22 So these treadmills can go from half a 23 mile an hour to 12 miles per hour, and the motor -- 24 the motor does its job doing that. I'm not on the 25 liability side. I'm not the technical person. But</p>
<p>Page 226</p> <p>1 having a proper description. 2 Q On page 29 at the bottom going over 3 to page 30 there's a sentence that says, "To the 4 extent survey respondents' interpretation of CHP is 5 different from Mr. Gaskin's definition, Mr. 6 Gaskin's proposed survey will not result in a value 7 that reflects the willingness to pay for the CHP 8 feature as defined by Mr. Gaskin." 9 Do you see that? 10 A I do. 11 Q If consumers are given a definition 12 for CHP, aren't they then able to make their 13 tradeoffs based on that definition? 14 A Just one second. Let me catch up 15 with you here. 16 If I understand your question -- and, 17 clearly, tell me if I'm missing the mark in my 18 answer -- but we say before that "Mr. Gaskin 19 defines CHP as 'how much power the treadmill motor 20 maintains throughout the workout.'" And I think 21 that's directly quoting from his Declaration. But 22 even that would be open to interpretation. In 23 other words, does the belt maintain its speed, or 24 does it hesitate at times? Are there problems when 25 it's on an incline versus being flat? Are there</p>	<p>Page 228</p> <p>1 it just seems to me that you want to make sure in 2 the survey that the respondents get enough 3 information to make an informed decision and to 4 provide accurate information as to what the survey 5 is trying to obtain in terms of information. I 6 think that's the point there. It's not -- it's not 7 -- well, let me try it this way. That's how I 8 think -- what I'm trying to say in that paragraph. 9 Q Let's go to paragraph 52. You talk 10 about "For consumers who researched and understood 11 the HP rating contained on Sole's marketing 12 material for the challenged products (i.e., that 13 the products do achieve the desired performance), 14 the value obtained by Mr. Gaskin would be an 15 inappropriate measure of economic harm because the 16 performance of the products would not be any 17 different than what the consumer actually is 18 achieving." 19 Are you suggesting there that a consumer 20 could research and determine that the F80 does or 21 doesn't achieve 3.5 horsepower? 22 A I think this is what we talked about 23 previously, "For consumers who researched and 24 understood the HP rating contained on Sole's 25 marketing material for the challenged products,</p>

<p>1 (i.e., that the products do achieve the desired 2 performance)." So it's just making sure that 3 ultimately, frankly, regardless of what the 4 horsepower capabilities are or the horsepower 5 ratings, if the consumer is looking for a 6 particular performance level, the consumer is 7 paying for that performance level. And they may 8 understand the performance level they're getting. 9 That's the point. 10 Q Okay. Great. Page 32 to 33, 11 paragraph 57, you're talking about the Sawtooth 12 software, and you have a sentence there that reads, 13 "However, the market simulation procedure described 14 by Mr. Gaskin does not incorporate competitors' 15 products and, hence, does not reflect the procedure 16 as described by Sawtooth software." 17 Do you see that? 18 A I'm sorry. Can you just point it to 19 me? I didn't quite see it yet. 20 Q Paragraph 57, last line on page 32, 21 middle of that line. "However, the market 22 simulation procedure described by Mr. Gaskin does 23 not incorporate competitors' products and, hence, 24 does not reflect the procedure as described by 25 Sawtooth software."</p>	Page 229	<p>1 Unfortunately, it's a long sentence, so about 2 halfway down. 3 Q All right. And you're saying that 4 the Orme document, "Market Simulators for Conjoint 5 Analysis," would suggest that competitors' products 6 should be included in a market simulation? 7 A Yes. 8 Q Okay. And I know you've been 9 subject to Daubert motions before. Can you tell me 10 roughly how many times? 11 A No, but some of it might depend on 12 the cause of action. But also, as you know, as all 13 attorneys know, I mean, Daubert challenges are kind 14 of another weapon in the attorney's arsenal these 15 days. So whether they have merit or not, you know, 16 you see a lot of Daubert challenges because there's 17 probably -- the only thing better than knocking out 18 the damages expert is maybe knocking out the 19 liability expert. So you just kind of see that. 20 So I guess -- 21 Q In one instance involving this type 22 of analysis you were excluded from giving certain 23 opinions regarding conjoint survey analysis. And I 24 know Daubert motions tend to be more common 25 nowadays. Apart from that, have your opinions ever</p>	Page 231
<p>1 A Right. Okay. I see it now, yes. 2 Q There's no cite there. Are you 3 suggesting that Sawtooth software or one of the 4 guides relating to it says that a simulation such 5 as the one Mr. Gaskin proposes has to include a 6 competitors' products? 7 A I'm saying that the Sawtooth 8 software descriptions caution against getting 9 results that are less accurate when you do not 10 acknowledge in the market simulations the existence 11 of competitive products. 12 Q All right. So you're suggesting 13 that the Sawtooth software guides would tell us 14 that we should incorporate competitors' products 15 into the market simulation? 16 A Yeah, and you said that I had no 17 citation. That's not quite accurate. If you go to 18 paragraph 60, at the end of the first sentence 19 you'll see a citation to documentation. 20 Q Okay. And it's your contention that 21 that documentation, paragraph -- I'm sorry. What 22 did you say? 23 A Paragraph 60 on page 34. 24 Q Mm-hmm. 25 A End of the first sentence.</p>	Page 230	<p>1 been excluded or limited? 2 A Yeah, I might have missed the 3 beginning of it. If we talk about consumer class 4 action cases -- I don't know if you want to 5 restrict me to that versus other types of cases, 6 but in consumer class action cases there's been a 7 number of Daubert challenges. I think I know of 8 one case -- well, I certainly know of one case 9 where they challenged on the basis of me not being 10 a survey person. But I absolutely remember the 11 judge saying, "Hey, I read the report, and he 12 absolutely is qualified to talk about what he's 13 talking about," because it's sort of the economic 14 and damage quantification issues. So there's been 15 attempts at that. And, like I said, I absolutely 16 saw an opinion where the judge disagreed. So that 17 was, I think, denied in whole. There was a 18 challenge once on a whole report, and I think it 19 was like one paragraph unrelated to survey 20 techniques where the judge had a problem with one 21 paragraph in a hundred-page report. And I think 22 there's one other I remember where the plaintiffs 23 were complaining about four or five things that I 24 was saying, and the judge agreed with one of them. 25 But, generally speaking, I would -- you know, I'll</p>	Page 232

<p style="text-align: right;">Page 233</p> <p>1 put my body of work on consumer class action cases 2 up against anybody. And I think I've, you know, 3 been relatively unscathed. That's not to say that 4 there hasn't been, you know, a little issue here or 5 there, but overall, I mean, the types of opinions 6 I'm giving here I give all the time. And it's been 7 precious few times that the judges disagreed from a 8 Daubert perspective of what I was doing. But I 9 think to the best of my ability I've also tried to 10 give you each and every occurrence in consumer 11 class action cases that I'm aware of.</p> <p>12 Q Would you agree that Sole has 13 prevalently represented in its advertising and 14 marketing that its treadmills have a specific 15 continuous horsepower, or CHP, from January 1st, 16 2014, through December 31st, 2019?</p> <p>17 A I have -- I do not have independent 18 evidence of that. I know what the assertions are. 19 I know when they no longer had the CHP on the 20 websites as of August 2019. I can't factually say, 21 you know, over the entire time. I just don't know. 22 I'm accepting that assertion by the plaintiffs.</p> <p>23 Q You would agree that it's reasonable 24 for Sole treadmill purchasers to rely on Sole's 25 advertising when purchasing a treadmill?</p>	<p style="text-align: right;">Page 235</p> <p>1 thrust of the -- you can say the exact same words. 2 I don't need you to change your words. I just need 3 to hear it again.</p> <p>4 Q You would agree that advertising of 5 consumer products sold at retail can have an 6 influence on the market price paid by a consumer of 7 that product?</p> <p>8 A I think it depends. I mean, are you 9 differentiating your product -- you know, 10 advertising provides information, and it informs 11 consumers, not only with respect to the product 12 being advertised, but perhaps differences to other 13 products. Some advertising can be demand 14 increasing, and that could have an impact on price, 15 or it could have an impact on the unit sales. So I 16 think it just depends on the facts and 17 circumstances and the nature of the advertising.</p> <p>18 Q I'm going to give an example. Would 19 you generally agree that organic food products are 20 more expensive than nonorganic?</p> <p>21 A I think I would agree with that. 22 Generally speaking, sure. For a variety of 23 reasons. There could be a demand side, but also 24 there's the cost side as well. So it's not all 25 demand-side driven. Some of it is cost-side</p>
<p style="text-align: right;">Page 234</p> <p>1 A Sure. I'll agree with that. But, 2 you know, this is also a type of good that people 3 do their own independent research as well. So I 4 think consumers look at a variety of information, 5 also an experience good, test it out. But I'm not 6 going to walk away from, you know, if the 7 manufacturer advertises that people will look at 8 that.</p> <p>9 Q And when Sole's putting together 10 advertising, they're trying to focus on points they 11 believe will resonate with a potential purchaser to 12 induce them to purchase the product; correct?</p> <p>13 A I think I will agree with that. But 14 if you also look at the websites, there's a wealth 15 of information there. I mean, there's a lot of 16 different attributes. And then they also -- my 17 understanding from Mr. Macfarlane's testimony is 18 that, you know, they basically did the experiment 19 of let's take the C off, you know, and see what 20 happens.</p> <p>21 Q You would agree that the advertising 22 and consumer products sold at retail can have an 23 influence on the market price paid by a consumer of 24 that product?</p> <p>25 A You can say -- I just missed the</p>	<p style="text-align: right;">Page 236</p> <p>1 driven.</p> <p>2 Q As part of your work, did you look 3 at the question as to whether or why Sole 4 highlights horsepower attribute on its products?</p> <p>5 A I think the answer for sure on a 6 whether -- W-H-E-T-H-E-R, whether -- I mean, we 7 talked about the Google ads and how infrequent the 8 motor description is on Google ads. But I also 9 looked at -- personally at each -- and spent a lot 10 of time on Sole's website for each and every one of 11 the models that are on the website, and they do 12 contain the horsepower statistic. There are other 13 descriptions of the attributes of the motor, but 14 there's a ton of other information as well, all the 15 different specifications and everything else. If 16 you go on the website there's a wealth of 17 information there. So, you know, including some of 18 the accolades and the awards. So I think they're 19 just providing the full range -- I mean, my 20 takeaway was they were providing the full range of 21 information about the treadmills to the consumer.</p> <p>22 Q You don't believe they were 23 highlighting horsepower in any respect in their 24 advertising?</p> <p>25 A Not any more than any other</p>

1 attribute they've got there. It wasn't -- not --
2 when you look at the pure number of just attributes
3 they have there and the descriptions, I don't think
4 I would say they were highlighting it. I mean,
5 it's the same as -- you know, I think some of the
6 treadmills said, hey, we can carry a 325-pound
7 person. Other ones are saying 350 pounds, another
8 375. Does that mean you're highlighting that or
9 just informing the consumer? So I don't think the
10 horsepower engine was any -- motor was any more
11 than saying, "Here's the weight of the person it
12 can effectively carry and keep the performance
13 level up."

14 Q Well, Dr. Ugone, it was a pleasure
15 speaking with you today. I have no further
16 questions at this time.

17 A Well, very nice meeting you.

18 Q Nice meeting you.

19 THE COURT REPORTER: Signature?

20 MR. GAMACHE: We'll go ahead and reserve,
21 please.

22 THE COURT REPORTER: Thank you. Did you
23 want this transcribed? I need to ask for the
24 record.

25 MR. MARKOVITS: Yes.

1 THE COURT REPORTER: And, Mr. Gamache,
2 would you like a copy?

3 MR. GAMACHE: Yes, copy, please.

4 (The taking of the deposition concluded
5 at 4:50 o'clock p.m.)
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9
10 KEITH RAYMOND UGONE, Ph.D.

11 DATE
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239


STATE OF OHIO)
) SS: C-E-R-T-I-F-I-C-A-T-E
COUNTY OF MIAMI)

I, SUSAN L. BICKERT, a Court Reporter and
Notary Public in and for the State of Ohio at large,
duly commissioned and qualified,

DO HEREBY CERTIFY that the above-named
KEITH RAYMOND UGONE, Ph.D. was by me first sworn to
testify to the truth, the whole truth, and nothing
but the truth; that his testimony was reduced to
writing by me stenographically in the presence of
the witness and thereafter reduced to typewriting;
that the signature of the witness to the deposition
was expressly not waived, and was taken at the time
and place hereinafter set forth, pursuant to Notice
and Agreement of Counsel.

I FURTHER CERTIFY that I am not a rela-
tive nor attorney for either party herein, nor in
any manner interested in the event of this action.

IN WITNESS WHEREOF, I have hereunto set my
hand and seal of office May 17, 2021.



SUSAN L. BICKERT
Notary Public, State of Ohio
My Commission expires: 8-23-23

1 1 DEPOSITION ERRATA SHEET

2 Date Taken: May 4, 2021

3 Case Caption: LAURA BECHTEL and TROY THOENEES

4 vs. FITNESS EQUIPMENT SERVICES, LLC dba SOLE FITNESS

5 DECLARATION UNDER PENALTY OF PERJURY

6 I declare under penalty of perjury

7 that I have read the entire transcript of

8 my Deposition taken in the captioned matter

9 or the same has been read to me, and

10 the same is true and accurate, save and

11 except for changes and/or corrections, if

12 any, as indicated by me on the DEPOSITION

13 ERRATA SHEET hereof, with the understanding

14 that I offer these changes as if still under

15 oath.

16 Signed on the _____ day of

17 _____, 20____.

18 _____

19 KEITH RAYMOND UGONE, Ph.D.

20

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1 2 DEPOSITION ERRATA SHEET

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24 KEITH RAYMOND UGONE, Ph.D.

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24 KEITH RAYMOND UGONE, Ph.D.

25

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